DOCUMENT RESUME

ED 156 353	PS 010 000
AUTHOR	Costin, Lela B.; And Others
TITLE	The Challenge of Child Day Care Needs and Improved Federal and State Approaches to Day Care Standard Setting and Enforcement.
SPONS AGENCY	Department of Health, Education, and Welfare, Washington, D.C. Office of the Assistant Secretary for Planning and Evaluation.; Department of Health, Education, and Welfare, Washington., D.C. Office of the Secretary.
PUB DATE	Mar 77
CONTRACT	SA-6642-76
NOTE	96p.; For related documents, see ED 149 861 and PS 009 986 - PS 010 006 ; Filmed from best available copy
EDRS PRICE	MF-$0.83 HC-$4.67 Plus Postage.
DESCRIPTORS	*Certification; Child Care Centers; *Day Care Services; Early Childhood Education; Family Day Care; Federal Court Litigation; Federal Regulation; *Federal State Relationship; Financial Support; Government Role; Historical Reviews; Interagency Coordination; *Needs Assessment; *Quality Control; Staff Improvement; Standards; *State Standards; Surveys
IDENTIFIERS	*Federal Interagency Day Care Requirements

ABSTRACT

This paper examines child day care needs and ways that federal and state approaches to day care standard setting and enforcement might be improved. Chapter I documents the magnitude of child day care needs, citing Department of Labor, Census, and other survey statistics on the numbers of children needing day care and the number of day care centers and homes in operation. Chapter II reviews the history of state regulation of out-of-home child day care from the 1800's to the present. Chapter III analyzes the current status of center and family day care home regulation. Chapter IV presents survey statistics demonstrating the existence of quality problems in day care facilities. Chapter V outlines four basic problems in current state and local licensing practices and offers recommendations as to how these problems might be alleviated. The four problem areas scrutinized are: (1) interrelationships of agencies involved, (2) acquiring, training, and retaining qualified licensing staff, (3) uniform administration of regulatory standards, and (4) fairness in rule making. Chapter VI calls for federal legislation and increased federal funding to improve day care program quality and discusses what the role of the federal and state governments in day care licensing should be. Appendix A probes the legality of federal participation in the day care regulatory process. Appendix B explores alternatives to current licensing approaches including the substitution of registration for licensing and the development of a network of family day care homes linked to central service centers. (JMB)

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THE CHALLENGE OF CHILD DAY CARE NEEDS AND IMPROVED FEDERAL AND STATE APPROACHES TO DAY CARE STANDARD SETTING AND ENFORCEMENT

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Child Welfare League of America

Prepared Under Order No. SA-6642-76 For
Office of Assistant Secretary for Planning and Evaluation
U.S. Department of Health, Education and Welfare

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INTRODUCTION

The Child Welfare League of America has long had an intense interest in and involvement with day care service. Our agencies have been leaders in offering quality, innovative day care services for more than five decades. During World War II, the League played a substantial role in ensuring that the massive growth of day care was not deleterious to the children placed in care. Since 1946, we have played a major role in developing day care service as a high-quality child welfare service, with multi-disciplinary emphases, through a series of publications and through the process of Standards formulation and publication. In the early 1970's, we monitored and reported on the rapid growth of for-profit interests in the day care field. We also pressed for continued recognition that public funds should only be spent for day care services that benefit children.

For these reasons, and because we consider the matter of quality day care so critical to the Nation, the League agreed to write this paper for HEW's Assistant Secretary for Planning and Evaluation. The paper examines the challenge of day care, how improved federal and state approaches to day care standard setting and enforcement might be undertaken in the context of present law, present needs for quality day care service, needs of parents in the work force, and the needs of the society as a whole.

We were fortunate to secure a group of outstanding, experienced persons who were willing to address themselves to this complex issue. Four persons contributed papers, ideas, and critiques.

Mary Dublin Keyserling is the chief author. She is a Consulting Economist, former Chief, U.S. Women's Bureau, immediate Past President, National Day Care Association, an outstanding authority on day care who is the author of two major studies of day care, Windows on Day Care (1972), and New York City Child Care Programs: Challenge Ahead (1974).

Contributing authors were: Lela Costin, Professor, School of Social Work, University of Illinois at Urbana-Champaign, an outstanding expert in human services licensing; William Pierce, the League's Assistant Executive Director, formerly Child Care Consultant for the League, during which time he undertook a three-year foundation-financed study of the Expansion of Day Care in the U.S., and former Assistant Director, Day Care and Child Development Council of America, Inc.; and Walter Wadlington, Professor, School of Law, University of Virginia, a noted authority on family law and a Consultant to HEW on its Model Day Care Licensing Project.

Doris Swain, recently retired Day Care Consultant for the League, an experienced operator of day care service, social work instructor in day care as a child welfare service, who counseled day care administrators throughout the U.S. and Canada, also contributed her ideas.

Although we are indebted to all three contributing authors for their varied contributions, we are particularly grateful for the unique and substantial contributions made by Mary Dublin Keyserling, who served as Chief Author of this work. Her enthusiasm for the task, her dedication to detail, her ability to reconcile the contributions of those with very different professional backgrounds, and her ability to organize a huge amount of data into a useable paper need particular recognition.

We believe this paper presents a number of new, exciting ideas for those policy planners who must grapple with decisions affecting millions of children and their families. Although prepared under the auspices of the League, its emphases, interpretations, conclusions, and recommendations are those of the authors and not necessarily those of the Child Welfare League of America.

Joseph H. Reid
Executive Director
Child Welfare League of America
March 1977

The Challenge of Child Day Care Needs and Improved Federal and State Approaches to Day Care Standard Setting and Enforcement

I. The Magnitude of Child Day Care Needs

One of the most urgent unmet social needs of our nation today is the need for the substantial expansion and improvement of child day care services.

The most pressing imperative is for more adequate care of the preschool children of gainfully employed mothers. As of March 1976, 5.6 million mothers of children under the age of six were in the labor force.[1] The proportion of working mothers of children less than six years nearly tripled between 1950 and 1976; in 1950, it had been 14 percent; in 1960, 20 percent; and by 1976 was 40 percent.[2]

In 1976, employed mothers had a reported 6.4 million preschool children.[3] Between 1960 and 1976 there had been a 2-1/2 million increase in the number of preschool children with gainfully employed mothers, a growth of more than 60 percent. This very rapid rise was all the more striking in the light of an unprecedented decline in the birthrate during the period.

In addition to these children, there were, in 1976, an estimated 400,000 related children under six (other than the "own" children of the family head) living in families in which the mother of the household was in the labor force. There were also about 80,000 children in families headed by single parent working fathers.

Thus, day care arrangements were needed in 1976 for about seven million children of preschool age because their own or surrogate mothers or single parent fathers had to be out of the home due to their employment responsibilities.

Day care arrangements are also needed for many other preschool children including those whose mothers are students or engaged in work training programs or in part-time volunteer activities or who are ill and unable to care for them. And there are many additional children whose parents wish them to benefit from the developmental experiences good day care affords, on a part-day basis, or who, for a variety of reasons, desire an occasional brief care arrangement.

There were also, as of March 1976, about 14 million children aged 6 through 13, whose mothers were in the labor force,[4] a large proportion of whom needed care arrangements during after school hours; some needed care before schools opened.

To meet the overall need for day care services there were, as of 1975, licensed or approved child day care group centers and family and group day care homes with a capacity to care for an estimated 1.7 million children of all ages, including those under the age of six cared for either full day or part day, full week or part week and those over six years of age. It should be noted that centers and homes enrolled many children of mothers not gainfully employed.

This estimate of licensed or approved center and family day care home capacity is based on annual reports issued by the National Center of Social Statistics U. S. Department of Health, Education and Welfare, "Capacity of Licensed or Approved Day Care Centers and Family Day Care Homes," for 1972 and 1975. The source of these data are reports from state departments of welfare. In 1972, capacity of licensed or approved centers and homes, as reported by 50 states and three jurisdictions, was for approximately one million children. Of these 53 jurisdictions, only 33 reported both for 1972 and 1975. Between 1972 and 1975, the capacity of day care centers in the 33 jurisdictions was reported to have increased by about 50 percent (from about 500,000 to 752,000), and of licensed or approved family day care homes by about 140 percent (from 111,000 to 267,000). The 20 remaining jurisdictions, which did not report for 1975, had reported child care capacity in centers and homes in 1972 totalling about 410,000. Had this capacity grown at the same rate as in the 33 jurisdictions which reported for both years, it would have totalled about 710,000 in 1975 (460,000 in centers and 250,000 in homes). This would have brought total national capacity in 1975 to about 1.7 million (1.2 million for licensed or approved centers and .5 million for licensed or approved family day care homes).

It should be noted that this estimated growth in the capacity of these homes does not reflect an actual growth of this magnitude but consists, in large measure, of a transfer of homes from unlicensed or nonapproved status to licensed or approved status.

The 1975 overall capacity estimate developed above is fairly close to that estimated by Unco, Inc., in its December 1975 "National Child Care Consumer Study - Volume 1," prepared under contract for the Office of Child Development, U. S. Department of Health, Education and Welfare, totalling 1.6 million children provided care in licensed or approved day care centers and family day care homes. Abt Associates in their "National Day Care Study, First Annual Report, 1974-1975, Volume 1 - An Overview of the Study," also under contract with the Office of Child Development, HEW, estimated a total licensed or approved capacity for 1.5 million children. Both studies projected 1972 reported capacity to 1975 on the basis of assumed growth rates.

Almost all day care centers are believed to be licensed or approved. As discussed more fully below, it is estimated that about 95 percent of all homes of nonrelated persons providing care for the children of others are not licensed or approved.

While there was an estimated more than five fold increase in the reported capacity of licensed and approved centers and homes from 1965 to 1975, from a reported total of 310,000 to an estimated total of 1.7 million, or by 1.4 million, the number of preschool and young school-age children with mothers in the labor force had increased by more than three times that number during the period. Thus, these licensed and approved facilities, which cared for only a small percentage of such children in 1965 served a declining proportion of them over the decade.

In 1965, the Women's Bureau of the U. S. Department of Labor and the Children's Bureau, HEW, co-sponsored a national survey of the arrangements working mothers made for the care of their children.[5] The data were provided under a contract made with the Bureau of the Census which included questions about child care arrangements in its Population Survey of February 1965.

This report covered mothers who had been employed 27 weeks or more, whether part-time or full-time, in 1964, and who had at least one child under 14 years of age living at home. Almost half (47 percent) of the children under the age of six years were cared for in their own homes; about 31 percent were in someone else's home -- about one-half in the homes of relatives and half, nonrelatives; 15 percent were looked after by their mothers while working; and 6 percent were cared for in group care centers.[6] Some 20,000 children were reported to care for themselves, a number regarded as greatly understated for the reason that few mothers might be expected to report to an official census taker that this was the only arrangement they had been able to make. What proportion of the 15 percent of the children reported to have been looked after by their mothers while working were, in fact, left on their own, is not known.

With respect to school-age children aged 6 through 13, care in other than school hours was provided in the child's own home for 44 percent; 22 percent of the children had mothers who worked only during school hours; 12 percent were looked after by their mothers while working; another 12 percent were reported to look after themselves; 9 percent were cared for in someone else's home (4.7 percent by relatives and 4.6 percent by nonrelatives); and only one half of one percent of these young school age children were reported to be cared for, before or after school, in group care centers.

Respondents included in this survey reported on their day care arrangements in answer to the question "while (mother) was working, who usually looked after (child)? (About 11 percent of the children were reported to have a supplementary care arrangement in addition to the "usual" one.

Several national surveys made in 1974 and 1975 indicate that the child day care arrangement pattern had changed markedly over the preceding decade, but the methodology employed in these more recent studies differ so substantially from the 1965 survey that findings are not comparable.

A sample study relating to 1975 was undertaken by Unco, Inc.[7] which reported on child arrangements made by households with children under six, and aged six through 13, only, with working mothers and also with nonworking mothers. (The Children's Bureau-Women's Bureau 1965 study related to children under six and those six through 13, with working mothers.)

The table below summarizes Unco findings with respect to the "main method of care" reported by respondents utilized by households with a single employed parent and with both parents employed, with children under six, and with children aged six through 13, only. Similar data are shown for households in which the single parent was not employed and for two parent households in which only one parent was employed or both parents were not employed.

Table I

Distribution of Households with Children under 6, and with Children 6 through[8] 13, only, By Main Method of Child Care Arrangement, by Employment Status of Parents[8]

Main Method of Care	Percentage of Households with Children under 6		Percent of Households with Children 6 through 13, only	
	With single parent employed and both parents employed	With single parent not employed; with 2 parents-1 employed or both unemployed	With single parent employed and both parents employed	With single parent not employed; with 2 parents-1 employed or both unemployed
In own home				
by relative	13.0	17.6	12.8	10.5
by nonrelative	15.6	17.4	8.3	7.8
In other home				
of relative	18.1	20.5	14.5	12.7
of nonrelative	21.6	5.5	14.4	5.9
Nursery schools	9.9	4.4	.4	-
Group centers (incl. Head Start)	10.1	2.8	4.2	2.9
Used no extra mural method[9]	11.7	31.8	45.4	60.2
Total household				
percent	100.0	100.0	100.0	100.0
number (in 000's)	4,544	9,229	4,734	5,885

Of all households with children under the age of six, and with the mother gainfully employed (as defined in Table I above), it was reported that 40 percent provided for child care at home and an additional 40 percent arranged for care in the homes of others (18 percent those of relatives and 22 percent those of non-relatives) as their main method of child care arrangement. An additional 10 percent relied on nursery schools and the same percentage on group care programs.

Two-thirds of the households with children aged six through 13, only, and with employed mothers, arranged for child care before or after school in their own homes as the main child care arrangement; 29 percent in the homes of others (half those of relatives and half nonrelatives); and the remaining 4 percent in group care centers.

According to Unco findings, projected on a national basis, out-of-home care arrangements, at least one hour a week, were made for children under 14 of both employed and nonemployed mothers as indicated below, with mean number of hours per week shown.[10]

	No. of children in 000's	Mean hours of care per week
Homes of relatives	11,318	9.7
Homes of nonrelatives	7,065	11.8
Nursery or preschools	1,921	17.9
Day care centers	950	28.3
Cooperative programs	538	6.6
Before/after school programs	1,581	5.7
Head Start	121	21.3

These totals do not relate to "main arrangements" but involve some overlap due to multiple care methods used and also involve casual usage (less than 10 hours a week), moderate usage (10 to 29 hours), and heavy-full usage (30 or more hours).

The table below shows the number of these children, by type of out-of-home care arrangement made, for 10-29 hours a week, and for 30 hours or more a week.[11]

	Moderate usage, 10-29 hours a week	Full-heavy usage, 30 or more hours a wk
	(in 000's)	
Homes of relatives	1,637	1,258
Homes of nonrelatives	1,133	1,183
Nursery or preschools	481	532
Day care centers	249	534
Cooperative programs	55	29
Before/after school programs	314	16
Head Start	62	42

A second recent study has produced findings that are exceedingly different in most respects from those of Unco. In October 1976, the Bureau of the Census published a report on the daytime care of children,[12] with the data derived from Current Population Surveys conducted in October 1974 and February 1975. Findings related to children aged three through six, and seven through 13.

Of all children aged three through six, and with mothers in the labor force, it was reported that 69 percent were "usually cared for" in their own homes, 27 percent in homes other than their own (12 percent those of relatives and 15 percent those of nonrelatives), and 4 percent in day care centers. Enrollment in nursery schools, kindergartens and elementary schools was tabulated separately but not as a "usual care arrangement" method.

The Census study projected on a national basis estimated that a total of 1.3 million children aged three through 13, regardless of the mother's employment status, were "usually cared for" in a nonrelative's home, 1.2 million in a relative's home, and 326,000 in day care centers. These totals are very much lower than those reported by Unco. The Census survey reported that 2.1 million three and four year olds were enrolled in nursery schools and prekindergartens as compared with 2 million reported by Unco.

It is apparent that differences in the methodology and definitions used make the findings of the 1975 Census survey noncomparable both with the 1965 Census-based and 1975 Unco-sample surveys and render them inconsistent with reports of state welfare departments on day care center capacity. In part, the striking differences may be due to the exclusion of nursery school enrollees from 1975 Census tabulations of care arrangements. Some respondents may report enrollment of children in nursery schools while others using the same facilities may consider them day care centers. Many other elements are involved. In any event, the very sizeable differences warrant further exploration on the part of the federal agencies and others concerned.

It is evident, however, from data now available, that as the number of pre-school aged children with working mothers rose rapidly during the decade 1965-1975 -- by over 2 million -- there was a substantial increase in the number of families making out-of-home arrangements for their children's care in day care centers and in family day care homes. Families in which mothers were not employed also made considerably greater use of these facilities, usually on a limited time basis. Attendance in nursery and other preschools and kindergartens accelerated especially rapidly. In 1965, 27 percent of all children aged three, four and five were enrolled in these programs; the percentage had nearly doubled by 1975 to 52 percent. The actual number of such children enrolled increased by almost 2 million over the decade.[13] The proportion of three and four year olds, alone, enrolled in nursery schools increased three-fold, over the decade, from 10.6 percent in 1965 to 31.5 percent in 1975, of all children of this age. Many working mothers who enrolled young children in pre-primary school programs, most of which operate on a part-day basis, made some additional out-of-home arrangement for care during the hours before parents could return from work.

According to the reports of state welfare departments of all day care centers about half are operated on a proprietary basis and half as nonprofit programs by voluntary groups or, to a relatively small extent, as public programs. Centers are licensed with relatively few exceptions.

If, as the Unco survey reports, homes of nonrelatives provide day care for one or more hours a week for about 7 million children, there may be as many as two to three million homes providing such care for nonrelated children. Of these homes, about one-third were found to provide care ten or more hours a week. State welfare department reports on the number of licensed or approved family day care homes suggest that about 120,000 family day care homes may have been licensed or approved in 1975. This is estimated to be equivalent to about 15 percent of the number of homes of nonrelatives reported by Unco to be providing care for ten or more hours a week.

Income status of the family as well as the employment status of the mother are major factors determining the type of day care used and the amount of usage. According to Unco findings, respondents who worked 30 to 49 hours a week used thirteen times the average number of weekly hours of day care center services than those not employed, ten times the average number of hours in the homes of nonrelatives and eight times the average number of hours in nursery schools, than nonworking mothers.[14]

The substantial increase, over the past decade, in the number of children provided day care in out-of-home arrangements for a considerable number of hours a week has been accompanied by growing nationwide concern for the quality of services provided, and a desire on the part of many citizens and child-service organizations to promote a more effective approach on the part of local and state governments and the federal government to the establishment of child care standards and their enforcement.

II. State Regulation of Out-of-Home Child Day Care

Actual licensing, standard setting, and enforcement by law of day-time care facilities did not begin to emerge at the state level on any significant scale until the 1920's. However, over the preceding 40 years, a body of law had developed in response to awareness of deplorable conditions and widespread abuses calling first for state inspection and reporting on conditions, and later for control, of foster homes, "boarding" homes, and voluntary child care institutions such as "orphanages" caring for children on an around-the-clock basis. The total body of legal regulation includes both legislative provisions and a substantial administrative law component. The administrative law component has been a relatively recent development.

In 1885, Pennsylvania passed a foster care licensing law making it a misdemeanor for any person to engage in the business of offering care to more than two children under the age of three without a license from the mayor of the town, or justice of the peace, or local magistrate. In 1892, Massachusetts enacted a state licensing law.

Public opinion increasingly called not only for state inspection, supervision and control, but for provisions to prevent the establishment of inferior institutional and home facilities and to close down those operating below standard. While a growing number of leaders and organizations concerned with child welfare continued to demand state licensing programs, it was some years before substantial support was manifested. In 1919, this was reflected in a resolution passed by the Washington and Regional Conferences on Child Welfare which advocated that state boards of charities or similar supervisory bodies be responsible for the regular inspection and licensing of all institutions and agencies which cared for mothers with children and be given authority to revoke such licenses for cause and to prescribe forms for registration and reporting.

In the decade 1909 to 1919, the value of licensing as a function of the state was increasingly recognized.

Throughout the 1920's and 1930's interest in effective supervision and licensing of foster homes developed further as shown by the reports of the children's code commissions which were appointed in many states to study and recommend laws to bring about better care of children.

In 1930, a recommendation of the decennial White House Conference on Children, held that year, called for establishment of at least minimum standards "so as to insure to children under institutional care and in foster homes -- either free or at board -- proper care, education and protection."

Additional states began to enact licensing legislation until, by 1937, licensing laws which provided for state supervision and control of foster homes had been passed by the legislatures of 37 states. Much of the early support for licensing laws relating to foster care came from voluntary agencies which were providing a relatively high level of care to children and therefore sought to protect children from the threatening growth of poorer agencies and institutions.

In these pre-World War II years, enforcement was not widely effective; personnel was generally insufficient and lacking in needed specialized skills.

Today, all of the states have some kind of statutory provisions for licensing in the field of foster and institutional care of children although the provisions of the laws vary widely in effectiveness.

In contrast to the early legislation requiring licensing of foster care, legislation relating specifically to the licensing of day care programs developed relatively recently among the various states. This difference reflects the greater weight given to continuing parental responsibility in day care as compared with foster care, and a general reluctance to intervene in arrangements parents may make privately for their children's part-time care.

Child day care services had come into existence as early as the 1830's in the United States. A few hospital day care nurseries opened in the 1850's. As a result of philanthropic efforts to provide care for the children of low-income working mothers and to ameliorate the plight of neglected children, additional centers were established. The number of nurseries increased during the Civil War years as women took the places in industry of enlisted men. Later, the emergence of the settlement house movement in the 80's and 90's gave impetus to the expansion of day nurseries under their own and other auspices. Commercial enterprises also began to enter the field.

In 1898, a National Federation of Day Nurseries was established and expressed concern for the poor quality of care offered by many nurseries.

World War I gave rise to sizeable expansion of services. By 1923, it was estimated that there were about 23,000 children in somewhat more than 600 day care centers throughout the country, few of which were subject to any control or supervision. (Only one state -- California -- had enacted a law regulating day care prior to the war.) The largest number of children cared for by then existing facilities came from broken homes. The predominant opinion expressed by many social workers had, for many years, emphasized the need for funds to assist working mothers using day care facilities to stay at home. In consequence and because the proportion of gainfully employed mothers remained low, public pressure for the inspection, supervision and licensing of day care centers on a state or local basis was slow to make itself felt despite the fact that the U.S. Children's Bureau and a few voluntary agencies had recognized, even before World War I, the desirability of minimum legal standards.

By 1924, only six states had enacted some sort of legislation relating largely to physical safety, and a few cities had established provisions for day care licensing.

During the Great Depression of the 1930's, many day care facilities were brought into existence through Federal Emergency Relief Administration financing and later, Works Progress Administration funds. By 1937, it was reported that 40,000 needy children were being cared for under these programs. In addition, under the Federal Emergency Education Program, 3,000 facilities serving 65,000 needy children were set up in the 1930's.

The Social Security Act, passed in 1935, had made grants available to the states for child welfare services, including day care, and this, too, played a role in service expansion.

While these developments helped to stimulate some interest in state and local day care regulation; pressure for standard setting and enforcement was held back by a number of factors. Day care continued to be regarded as a welfare service to the poor and many social welfare groups and legislators continued to seek to discourage mothers from working. The assumption often was that the expansion and improvement of care facilities might lead more mothers to seek employment.

In some areas when disturbing day care conditions were revealed, efforts were made to utilize state and local controls relating to the regulation of foster homes and institutions.

Another factor retarding center regulation was that as day care facilities increased in number, the number of nursery schools and pre-kindergarten programs, almost entirely on a part-day, and often part-week basis, grew even more rapidly. These early educational programs enrolled mainly children from middle- and upperincome families in which few mothers were in the labor force. These elements of the population could, for the most part, purchase the kind of services they desired and were not actively concerned with the need for public standard setting and enforcement.

Even as late as 1940, only 1.4 million mothers of children under 18 were in the labor force -- only 8.6 percent of all women workers -- and the proportion was much lower for those with preschool children.

With the advent of World War II and the rapid entry of mothers into the labor force came a rapid increase in the demand for services and concern for the quality of care. The enactment of the Lanham Act made possible the federal financing of 3,000 centers which by July 1945 were serving 160,000 children.

With the end of the War, despite pleas from many organizations that the Lanham Act centers be continued, they were closed as of February, 1946 in all but one state, California, and in the city of New York. The California legislature voted to continue support on a two-to-one matching fund basis to local boards of education in communities willing to assume operational responsibility. New York City continued to fund on its own some 48 centers.

The assumption had been that the labor force participation of women, especially mothers, would immediately decline. This proved to be entirely incorrect. The percentage of mothers in the labor force, with children under 18, rose from 18.2 percent in 1946 to 30.4 percent in 1960, and to approximately 50 percent at the present time. The rate for mothers with children under the age of six advanced even more rapidly -- from 13 percent in 1948 to 20 percent in 1960, and to a rate presently exceeding 40 percent.

It became obvious that mothers were in the paid job world to stay, usually because their families needed their earnings. Fortunately, the economy was expanding, and jobs were there for them to take.

Families with working mothers had to utilize such day care services as they could find. As the number of centers and family day care homes multiplied, the community could no longer ignore the social consequences of detrimental and often actually hazardous facilities.

In the 1960's, the Children's Bureau intensified its efforts to promote the passage and improve the enforcement of state day care licensing laws. The Social Security amendments of 1962 also helped toward this end in providing funds, on a limited basis, to be expended for care in day care facilities approved or licensed in accordance with administratively-established state standards. The Child Welfare League of America and other national, state and local advocacy groups pressed strongly for standards and met with a growing measure of success.

In 1964, Head Start was initiated under the Economic Opportunity Act and other child care assistance programs followed in 1965 under Title VII of the Housing and Urban Development Act, in 1966 under Model Cities legislation, and in 1967 under the Work Incentive Program (WIN), among other enactments. More significant in the magnitude of their impact were the 1967 amendments of the Social Security Act which, under Title IV, made available to the states and localities on a 75:25 matching basis federal grants for social welfare services, including day care for children of past, present and potential welfare recipients. These grants remained open ended until 1972 when a ceiling of $2.5 billion was imposed by Congressional action. At the close of 1975, an amendment incorporated this program under Title XX of the Social Security Act. It is estimated that it funded

837,000 child years of local day care service in the amount of approximately $760 million (federal and nonfederal) in fiscal year 1976.

Between 1960 and 1967 the capacity of licensed or approved nonprofit day care centers was reported to have about doubled, whereas those under proprietary auspices more than tripled in response to accelerating demand. In the five years, 1967-1972, aided by the increased flow of federal funds, licensed or approved nonprofit center capacity tripled; that of proprietary centers increased about 50 percent during this period. By no means was all this reported growth an actual expansion in capacity. A considerable part of it represented the licensing of previously existent but unlicensed facilities.

— These trends, as reported by the Department of Health, Education and Welfare on the basis of information supplied by the states are summarized below:

Reported Capacity of Licensed and Approved Child Care Facilities in the United States, 1960, 1965 and 1967-1972

Year	Proprietary Centers	Public and Voluntary Centers	Total Centers[15]	Percent Growth	Family Day Care Homes	Percent Growth	Total, Centers & Homes[15]	Percent Growth
1960.	66,714	64,661	141,138	100	42,194	100	183,332	100
1965	140,000	112,000	252,000	179	58,400	138	310,400	169
1967	239,300	136,500	393,300	279	81,000	192	474,300	259
1968	231,000	166,700	438,000	310	97,200	230	535,200	292
1969	266,000	212,700	518,000	367	120,000	284	638,000	348
1970	293,000	284,700	625,800	443	148,200	351	774,000	422
1971	329,600	353,000	719,200	510	192,500	456	911,700	497
1972	354,200	405,832	805,360	571	215,840	512	1,021,200	557

Source: U.S. Department of Health, Education and Welfare

Data relating to years subsequent to 1972 are incomplete since from that year on, a diminishing number of states supplied information to HEW on day care facilities and their capacity.

Evidence suggests that while facility capacity has continued to expand since 1972, nonprofit facilities, which had increased rapidly during the years Title IV funds were open-ended, found it difficult to expand services after the ceiling was placed on Federal Title IV-A (later Title XX) allotments. This factor and rising costs in recent years has led to the curtailment of such services in many communities.

As day care services increased in the years after 1960, public awareness of the limitations in the quality of services available also grew and state legislatures and local governments were increasingly pressured to improve day care mandatory licensing standards and their enforcement.

In the early years of day care regulation the emphasis was primarily on identifying fire, safety and other physical hazards and dangerously serious substandard care situations. Negative sanctions were used to implement the licensing statutes which were designed to establish a minimal base below which no facility would be authorized to care for children. What constituted a minimal base consistent with the public interest continued to broaden over the years and began to include not merely minimum standards of safety but also concern for health, cognitive and psycho-social development and parent involvement. Increasingly, licensing laws set not only mandatory minimum requirements but also recommended higher-quality standards to serve as desirable goals to help improve the quality of service. A growing number of states and communities began to write into their statutes provisions with respect to the ratio of children to staff and group size limits, and a few developed requirements with respect to staff education and training and to program.

Licensing standards were revised upward not only in response to public awareness and demand but also as those persons providing care for children, or planning day care services, "internalized" the standards and identified with the philosophy and goals of progressive child welfare practice. Head Start staffing and quality guidelines had an important impact, too, in this connection.

By the mid-1960's almost every state had set up day care advisory committees and 41 jurisdictions had the authority to license day care centers and 44 to regulate day care homes either through licensing or by requiring certification.

In 1968, advance with respect to day care standards was considerably speeded by the promulgation of the Federal Interagency Day Care Requirements, although these governed only services funded by the federal government. These requirements were developed pursuant to a legislative mandate of the Economic Opportunity Act Amendments of 1967 requiring the coordination of day care programs under the jurisdiction of HEW and the Office of Economic Opportunity and a common set of program standards and regulations. They set group size limits, child-adult ratios, and required that all funded facilities be licensed by the state in which located, or approved as meeting state licensing standards, and hence be in conformity with safety, sanitation, facility and suitability and other requirements. In addition, they called for the provision of educational opportunities supervised by trained staff members, as well as health, nutritional and social services, parent involvement and periodic program evaluation.

Subsequent to the promulgation of the Federal Interagency Requirements the Office of Child Development of HEW initiated a Model Day Care Licensing Project which led to the drafting of a Model Act with the participation of numerous task forces on which were represented experts in the various fields involved, professional and child advocacy groups, and some state and local day care licensing agencies. This contributed to the improvement of state statutes, and created pressure for lowering others.

Another Model Act was also drafted, endorsed by some 35 national child advocacy organizations affiliated in the Day Care Alliance of the Coalition for Children and Youth which believed that the government-written code covered too much detail, was not in a form easily addressable by most state legislatures, and was not sufficiently protective of children. The Alliance Model Act endorsed child-staff ratios consistent with those set forth in the Federal Interagency Day Care Requirements (the HEW Model Act had reduced these ratios), and also stimulated State and local action.

During the years 1973-1976 many states continued to upgrade standards and improve regulatory procedures. In only 15 states were no legislative changes made during this period.

By mid-1975, every state in the Union and the District of Columbia had laws on their books requiring the licensing of day care centers. All but three required family day care homes to be licensed, certified or approved. Although reports on statutory changes since mid-1975 are not available on a national basis, available information indicates that, overall, improvements in state laws, in the training of administrative and enforcement staff, in public information and in inspection and enforcement procedures and practices have been ongoing.

Public Law 94-401 ("Child Day Care Social Services under Title XX of the Social Security Act," effective September 7, 1976), increased social services funding for child care and deferred the imposition of Federal staffing standards for day care through fiscal year (FY) 1977. For the July-September 1976 quarter, funding for day care under Title XX was increased $40 million, and for FY 1977,

$200 million was made available to the states. The additional funds were allocated to the states on a population basis, with no state matching requirements or maintenance of effort required. The purpose of these additional day care funds was to assist states in improving health, safety, and staffing standards. These funds could also be used to hire welfare recipients to work in day care centers. The law, however, suspended the FIDCR staffing standards pending the development of recommendations from HEW with respect to the appropriateness study of FIDCR, then due June, 1977.

As this paper was written, the Congress was considering an extension of P.L. 94-401 under H.R. 7200. Earlier, the House had agreed to a one-year extension of all the provisions, including an extension of the due date of the "appropriateness study" until April 1, 1978. $200 million would continue to be earmarked for day care services for FY 1978, but in subsequent years the earmark would be removed, and the Title XX ceiling would be increased from $2.5 to 2.7 billion.

The Senate Finance Committee has also agreed to extend the suspension of staffing standards for another year, and agreed with the House to continue the $200 million earmark for FY 1978. The Senate Finance Committee, however, proposed a five-year extension of the temporary provision allowing states to waive federal staffing requirements for day care centers and family day care homes that serve a small percentage of children whose care is paid for by federal funds. In addition the provision for hiring welfare recipients would be continued for five years. The Committee also proposed to delete the requirement in current law that prevents states from lowering their day care standards from September 1975 levels.

Before the bill goes to Conference, the Senate Finance Committee must finish its work, report H.R. 7200 to the Senate floor, and a Senate vote must be taken.[16]

III. The Current Status of Center and Family Day Care Home Regulation

Today the various statutes regulating day care services stipulate or recommend: the minimum and maximum number of enrollees; the size of class groups; adult-child ratios; and the physical structure of facilities including indoor and outdoor space, lighting, safety, the ratio of toilets and wash basins to the number of children, and indoor and outdoor play equipment; and reports and records; and code requirements of the local building fire, health and zoning departments. A limited number of statutes relate to child health and nutrition; the qualification of directors, teachers and aides (including education and training, health and character); and program content. Many states set standards for facilities caring for infants, toddlers and handicapped children.

Not many years ago there was relatively little regulation of family day care homes and group day care homes. As of mid-1975, 38 states, including the District of Columbia, had licensing statutes affecting day care homes relating to essentially the same elements as center regulations, and nine required certification. In two additional states, homes were licensed on a voluntary basis, and one licensed only those homes from which it purchased home care.

In 10 states, group day care homes were in a separate licensing category.

Despite the development of family day care home regulation, as was pointed out above, only a small percentage of these homes throughout the country are actually licensed, certified, or monitored. Although at present there are a very limited number of enforcement personnel, even within current budget stringencies, many state or other jurisdictions or localities could afford part of the cost of the effort which would be required to bring a much larger proportion of providers into compliance with regulations.

Some of the state statutes regulating family day care specifically exempt children in care who are related by blood or marriage to the owner or operator; some do not. In general, however, families which care for related children do not come within the scope of regulation.

The day care licensing authority in 33 jurisdictions resides with the Welfare Department and in 11 states this is shared with the Health Department. In two states, the Health Department licenses centers and the Welfare Department licenses family day care homes, while the Health Department has sole jurisdiction in one state. In two states a special office for children's services is responsible for licensing, among other functions; and two assign licensing to other administrative agencies.

Actual inspections to assure compliance with regulations are generally carried out on the city and county levels by the local welfare department, with reliance on the health department for inspection with respect to health and sanitation. In general, the fire marshal is responsible for fire safety compliance and the building authority for adherence to codes establishing physical structure requirements. Centers, family day care homes and group day care homes must also comply with local zoning ordinances.

There is great variation in licensing standards and procedures from state to state and in the different localities. Generally, these variations reflect differences in economic, social and legal conditions. In part they reflect the absence, when licensing standards were beginning to be promulgated, of model standards and model regulatory language, which existed quite early in the history of regulation in other legislative areas, and helped to unify approaches.

Despite the progress made, the statutes of states enrolling most children, with only relatively few exceptions, remain considerably short of the quality guidelines set forth in the Federal Interagency Day Care Requirements or in the Day Care Alliance model or the HEW sponsored model bills, and are thus less than adequate to assure the level of child protection which is generally regarded by the leading child serving agencies as desirable and to which children are entitled. A few states, enrolling a high proportion of children in care in the U. S., had improved their standards in the years prior to 1969.

To illustrate with reference to staffing: the Federal Interagency Day Care Requirements of 1968 required that the ratio of children aged three to four years not be greater than five-to-one adult; of children four to six years no greater than seven-to-one; and of those six through 14 years of age no greater than ten-to-one adult. As of October 1975, it was reported that only three states were consistent with the Interagency standards and set a child-adult ratio of five-to-one for the care of three to four year olds. In four states the ratio ranged from six-to-one to nine-to-one; in 29 it was 10-to-one, in four it was 12-to-one; in one state it was 14-to-one; and in 10 it was 15-to-one. (One state had no child-adult standards and two failed to report.) [17]

Similarly with respect to four to five year olds, only three states were reported to be consistent with the Federal Interagency Standards, as of October 1975, and set a child-adult maximum ratio of seven to one. Sixteen states set a ratio of 10-to-one; eight of 12-to-one; one of 14-to-one; thirteen of 15-to-19; and six states permitted as high a ratio as 20 children of this age to one adult. One state set no limit as long as two adults were present and two failed to report.

Similar discrepancies are to be found regarding requirements with respect to group size limits, the provision of educational opportunities, of health, nutrition and social services and parent involvement.

Many factors continue to inhibit the upward revision of state and local licensing standards. The major factor is clearly the cost of care which conforms to such standards as the Federal Interagency Requirements and which may range at the present time, from $35 to $60, or even more, per week, per child, in various communities.

While federal funding with state and local matching, has helped expand day care services, directly subsidized care has been available almost exclusively to the children of low income families. This has greatly assisted families headed by single working women, who are heavily concentrated in the low income earnings bracket. Only a small percentage of families with two working parents and children under six are eligible and benefitting. Fewer than 10 percent had incomes of less than $7,000.

The distribution of income of families with mothers in the labor force as of March 1975 and who had children under the age of six, is shown below:

Families with Children Under Six Years of Age and with Mothers in the Labor Force
As of March 1975, by Family Income in 1974

Family Income	Two Parent Families		Female Headed Families		Total Families	
	No. (000's)	%	No. (000's)	%	No. (000's)	%
Under $3,000	79	1.8	210	23.4	289	5.5
3,000-4,999	118	2.7	225	25.1	343	6.5
5,000-6,999	201	4.6	207	23.1	408	7.7
7,000-9,999	600	13.7	168	18.7	768	14.5
10,000-14,000	1,472	33.6	69	7.7	1,541	29.2
15,000 and over	1,912	43.6	18	2.0	1,930	36.6
Total	4,382	100.0	897	100.0	5,279	100.0

Source: Bureau of the Census, U.S. Department of Commerce; and U.S. Department of Labor

The million families with working mothers and with annual incomes under $7,000, had 1.4 million children under the age of six in March 1975. All nonprofit facilities throughout the country had the capacity to provide care to fewer than a third of that number of children, even if all their places were assigned solely to children under six and solely to those eligible for subsidy and subsidized, which they were not. If acceptable standards are to be rigorously adopted and enforced and centers and homes closed down when they fail to comply, the problem of what alternative care families can arrange for, has become a major and very difficult issue. A child may often appear better off even in a very marginal day care facility than in a home with no one providing care or supervision but a sibling, in a neglectful home, or deprived slum home. To crack down on deficient centers and homes may seem self-defeating.

As pointed out by Professor Lela Costin in her essay on "The Regulation of Children's Out-of-Home Care," "The community tends to view enforceable requirements in relation to whether a child's situation is improved by the available alternate child care arrangement. If it appears to be, this tends to become the public's baseline even if this base is less than that required by licensing standards or less than that endorsed generally as good child care."

Up to the present time the acceptance of much low grade out-of-home care has seemed to be the only alternative in many states since funds have not been available on a sufficient scale to subsidize the quality of care and so make quality care a realistic possibility.

But the future of many hundreds of thousands of children is at stake. Low-grade care may have detrimental lifetime implications. And it is not only children in low income families who are exposed to injurious care arrangements. Over two-fifths of all families with mothers in the labor force as of March 1975 and with children less than six years old, were in the $7,000 to $15,000 income bracket -- above eligibility levels for funded care, in all but a very few areas, and still unable to afford the cost of care meeting commonly recognized standards conducive to child development.

Some years ago, federal legislation was enacted providing income tax deductions for day care purchased by families with working mothers. In September 1976 this was replaced by provisions in the Tax Reform Law which now grants families a tax credit up to 20 percent of outlays for day care up to $400 for one child and $800 for two or more children. This credit is now available to all working couples, and single working parents, regardless of income and hence benefits families who do not itemize their deductions. (Families who do not owe taxes are not benefitted, however, since a tax refund equal to the amount of their credit is not allowed). While this expands the benefits available to many families, a $400 tax credit reduces the cost of $2,000 a year care to $1,600, a figure still beyond the means of most families between low and moderate living standards level. Thus, despite the latest tax benefits, a large proportion of families with working mothers still cannot afford standard acceptable care..

No state retains low quality standards because it likes them. All states recognize the human consequences of poor care and that the public interest requires satisfactory standards for the upgrading of low quality care. But their dilemma is real. No state has sufficient funds to subsidize services and so enable programs throughout the state to meet acceptable standards. Very few states have the financial means to assure the effective enforcement of even less than acceptable standards.

The consequence has been that, in the absence of needed funds, there has been an increasing and unfortunate tendency on the part of many state officials and others to rationalize the lack of funds or inadequate standards through weak enforcement. This is particularly true with respect to the regulation of day care homes. In this connection the argument is frequently made that, because of the high cost of their adequate monitoring, voluntary registration (which totally lacks sanctions) should be substituted for licensing and regulation.

IV. The Problem of Day Care Facility Quality

Several national surveys throw light on the quality of services provided by day care centers and homes. The National Council of Jewish Women, in May 1970, undertook a survey of day care needs and services in 90 cities. A total of 304 nonprofit centers and 127 proprietary centers were visited, then caring for nearly

24,000 children or approximately 4 percent of the total receiving care in center facilities at that time (an unusually large sample). On the basis of a large volume of specific data collected, relating to physical facilities, staff qualifications and ratio to children, and services rendered, the centers were classified as "superior," "good," "fair," or "poor." The table below summarizes the survey findings in this respect.

Percent Distribution of Nonprofit and Proprietary Day Care Centers Visited By Quality of Care

Rating	Nonprofit Centers &	Proprietary Centers &	Total &
Superior	9.3	1.0	7.1
Good	28.2	14.5	24.5
Fair	51.1	35.0	46.7
Poor	11.4	49.5	21.7
	100.0	100.0	100.0

Source: *Windows on Day Care*, by Mary Dublin Keyserling. New York, National Council of Jewish Women. 1972.

Only seven percent of the centers were regarded as "superior" or clearly developmental, a quarter were regarded as "good"; nearly half as "fair" or essentially custodial rather than developmental and more than a fifth were considered "poor" or actually detrimental. In the case of the proprietary centers whereas only one percent of those visited were considered "superior," about half were regarded as "poor."

With respect to family day care homes visited, while six percent were considered "superior," and 29 percent "good," 51 percent were rated "fair," or basically custodial, and 14 percent "poor." Some of the homes in the "poor" category were extremely bad.

A considerable number of local studies have resulted in similar findings. Field surveys of the General Accounting Office of the Federal Government and HEW audits of child care service programs federally funded under Title IV, Social Security Act (now Title XX), confirm the need for federal, state and local action greatly to improve the quality of child day care services.

The HEW Audit Agency, for example, undertook a field review of federally funded day care services in nine states during fiscal years 1972 and 1973 to ascertain the degree of compliance with federal, state and local child care requirements. Visits were made to 450 child care centers, 50 family day care homes, and 49 in-home care arrangements. More than three-quarters -- 77 percent -- were found not to be in compliance with state health, safety and sanitation codes, and 40 percent failed to meet the auditors' interpretation of the Federal Interagency Day Care Requirements with respect to child-staff ratios.[18] In 14 centers in three states caring for children aged two to six, the observed child-staff ratios ranged from 11:1 to 25:1, with 10 of the centers maintaining ratios exceeding 14:1. (Federal Interagency Requirements call for child-staff ratios ranging from 5:1 for children three to four years of age, to 7:1 for four to six year olds.)

V. Improving State Child Day Care Regulatory Procedures

There are many basic problems within the state licensing process itself, as it is currently practiced, which need to be faced. The failure on the part of federal, state and local authorities to address these problems systematically and consistently on a continuing basis has encouraged those who for different and sometimes contradictory reasons want to do away with day care licensing to say, "It doesn't work and can't work, so why have it?"

Some of the more crucial of these basic problems in present state and local licensing practice are outlined below together with recommendations as to how they might be alleviated.

A. Interrelationships of Agencies Involved

The multiplicity of departments at the state and local levels which must play a part in facility inspections -- health, fire, sanitation, building codes, personnel, etc. -- has been the cause of common complaint especially because of delays resulting from the involvement of numerous agencies, conflicting interprepations of requirements and resultant confusion. This has been true particularly in connection with initial application for licenses in which there are often long and cumulative delays.

Because a day care facility has multiple impacts upon a community and is a complex setting caring for vulnerable children, there are frequently as many as 70 or 80 separate tasks which must be completed in order to meet the full range of requirements.

Although it is recognized that state and local codes will continue to vary in relation to local needs and conditions, nonetheless an increasing degree of simplification and a more standardized approach would ease present difficulties.

Some ongoing mechanism should also be provided to further discussion of common problems and varying approaches, and to share the lessons of experience. A clearinghouse of information to serve the states and localities, centrally maintained by HEW, would be a vital asset.

It is suggested that at the state and local levels the establishment of interagency committees could make a significant contribution by bringing together representatives of the agency involved to seek agreement on the improvement of regulations and procedures.

Such interagency committees at the local level might also be a means of arranging joint visits to facilities to eliminate overlapping and contradictory inspections and for more effective overall monitoring.

Further, joint workshops of interagency personnel would help to inform staff members of their mutual responsibilities, e.g. licensing staff need to be better informed and more alert in detecting potential fire hazards and in knowing the possible corrective measures operators can take.

There are agencies other than welfare, health, fire, sanitation, and building departments which are sometimes involved and should also play a more coordinated role in monitoring, e.g., a state or local department of education or mental health involved in the purchase of day care for a severely handicapped child for whom the public schools have no educational programs, or for a developmentally disabled child.

To obtain better coordination of the various agencies involved, the licensing program should be seen in a larger context than it usually is, i.e., in terms of a community-wide overall day care system rather than in the one-to-one licensor-operator relationship.

The HEW guidelines for day care licensing issued in 1973 states that responsibilities of the licensing staff should include ongoing supervision of licensees and consultation to individual programs on the establishment and improvement of services to children.

There has been a marked shift in recent years in many states from an approach primarily concerned with "policing" to one which also offers consultative assistance to day care operators to help expand knowledge and promote understanding of the desirability of adequate standards, why compliance is essential to public welfare, and how it can best be achieved.

A survey of licensing practices in some states, conducted in November 1973 by the Illinois Economic and Fiscal Commission as part of a day care needs and services, found that 34 of 42 licensers who responded indicated that consultation was part of the official responsibility of day care licensing staff members. In connection with this study interviews with licensers were also conducted and it was found that an overwhelming majority felt a consultative role was desirable, believing that consultation can play an important role in improving day care services beyond minimum licensing standards.

A number of questions have been raised, however, as to whether licensers assigned a consultative role may not have a tendency to relax their supervisory responsibilities and apply standards less firmly. This has often been found to be the case. It has also been noted that some licensers with consultative roles also are inclined to deny fewer licenses to initial applicants and to applicants for license renewals, and also are less inclined to take action to revoke licenses, even when there is obvious lack of compliance. Further, concern has been expressed that consultation may divert too much of the licenser's time from monitoring, and that licensers assigned a consultative role may use their regulatory power improperly to pressure for the acceptance of nonmandatory suggestions which they may wish to make.

While these are potential difficulties, they can be avoided to a considerable extent by appropriate training to develop both strong supervisory and consultative skills in order that they may be mutually reinforcing.

Written manuals to further inspector awareness of the total process are desirable. Such manuals would also inform licensing applicants and ongoing day care personnel of requirements, steps to be followed, people to be contacted (names, addresses and phone numbers), forms to be utilized, etc.

Because parents have minimal contact with day care licensing personnel and frequently have never seen the published standards, the preparation of a simplified version of a manual could acquaint them with standards and give them access to the licensing appraisal forms.[19] Periodic surveys of parents could be additional valuable means of communication.

Such contacts with parents could reduce the "relevancy" gap between parents, operators and licensers and also facilitate parent participation in and concern for monitoring.

When parents using unfunded services become dissatisfied with their children's care they may remove their child from the facilities, regarding this as the only step they can take. Even if they are aware of the licensing law, they may not perceive any easy channel of communication to the licensing agencies. (AFDC parents using Title XX funded care often do not have the same freedom of choice.)

B. More and Better Trained Licensing Staff Required

Another important step for improving the regulatory process is to increase the number of licensing personnel. In few cities and counties are the number of persons assigned to the local licensing process sufficient in number or adequately trained to carry out their responsibilities. Because of the limitation of state and local funds for this function and because of its essentiality to child and general public welfare, it is recommended that federal funding be made available to assist communities in the child day care regulatory process.

Improvement of the status of licensing personnel is also essential. Many feel they are held in low esteem by their administrators and by other direct service personnel. On the assumption that "anyone can license a day care facility," frequently inexperienced personnel are assigned to licensing. In other instances persons are assigned this function without regard for the fact that they aspire to be clinically oriented social workers who can exercise highly individual judgments. Such persons are unlikely to do well in applying licensing standards.

When federal and state government get together more systematically and collaboratively to improve licensing administration in the states, when improvements in day care licensing services become more visible, when licensing personnel in the states at all levels are helped to attain new skills in applying mandatory licensing standards, when the complexity of those skills and the potential for children in a competent administration of licensing are given more recognition, then the status of licensing personnel and the prestige that accrues to the licensing function in the child welfare system will rise and better qualified persons will be attracted and assigned to licensing.

Lack of recognition of how much specialized knowledge is needed to evaluate a day care center, for example, and the evident higher status assigned to direct service in situations of "pathology" or "crisis" contribute to higher turnover among licensing staff and loss of personnel who have the potentiality to become excellent regulatory staff.

Volunteers and paraprofessionals are often assigned the same duties as are professional licensing staff rather than being assigned selected tasks to assist or supplement the professional staff. As a result, the gains to be realized from the use of volunteers and paraprofessionals are often lost and the self-image of the professional licensing staff diminished.

The lack of status often is compounded by confusion in the duties of licensing personnel at different levels of agency organization -- a lack of clarity about exact duties and responsibilities. This in turn contributes to a conviction on the part of many front line licensing staff that "We can't deny a license or revoke one even when a situation is clearly below standards because the administration -- or legislature -- won't back us up."

Persons assigned to licensing often do not adequately comprehend their functions even after considerable experience on the job. In many cases social workers and other public welfare personnel are assigned these functions, either directly or in a supervisory capacity, and have had no preparation for them because few schools of social work include in their curricula accurate and comprehensive discussions of government regulatory authority or other processes of licensing. Basic concepts relevant to government's role in other welfare services are taught, but even when these concepts also have applicability to the regulation of out-of-home child care, they are rarely identified as having that applicability.

Inadequate provision of in-service training and other programs of staff development constitutes a major weakness in present-day licensing practice.

One large state with a history of strong professional attention to improving the regulation of children's out-of-home care in 1974 carried out a program evaluation of the activity in day care licensing and regulation of the

State's department assigned this responsibility. Among the findings was this one: "Licensers were asked what training they had received before being allowed to license facilities on their own. About 20 percent responded that they had received none. For the rest, a typical "training procedure" reported was that they were simply given a copy of the standards and told about licensing procedures in conferences with supervisors. About one-third said they had made joint visits to day care facilities with experienced licensing personnel. Only four licensing workers reported they had some kind of extended training experience... Almost all licensing personnel indicated that they would like to receive more training in one or more particular aspects of their jobs."

Courses should be developed in schools of social work, which should also be open to licensing personnel, whose training and experience has been in other than social welfare areas, and which should be informative about the investigative, evaluative and law enforcement aspects of licensing.

To the extent that appropriate courses cannot be offered by schools of social work, other schools might well be able to develop them, or the departments themselves could arrange workshops on a continuing periodic basis.

Basic concepts which should be taught in such workshops include: the basis of governmental regulatory authority; discretionary justice; "floor of protection"; prevention vs. protection; the nature of constituted and inherent authority and constructive use of such authority; police power vs. parens patriae; licensing as a means of regulating private agencies -- but why not public agencies?; licensing standards -- what they are and the rationale that underlies them; principles and techniques of observation and evaluation; the limits of licensing; the systematic steps in the licensing process; the summary judgment; and reasonable compliance.

Systematic training procedures for new licensing personnel might well include the use of a written test on licensing standards and practice that had to be passed before being allowed to perform licensing functions.

The need for appeciating the importance of specialized skills and giving them recognition would help elevats the sense of status in the various assignments involved.

Periodic regional and state-wide meetings for day care licensing staff would help foster learning about special aspects of the job, such as the application of fire or health standards, and would help provide opportunities to discuss changes in licensing policy. This would also provide a means for reaching a consensus in relation to criteria used in the application of mandatory standards.

C. The Need for Uniform Administration of Standards

There is need for a reliable and uniform frame of reference for the application of mandatory standards to assure equal treatment of applicants for licenses.

Discrepancies and inconsistencies in judgment are often apparent in the application by different licensing personnel, of standards across a state due to differences in interpretations of what a particular standard means. Inadequate treatment may also be found in the work of the same staff person over time due to differences in applying a given standard even when it is uniformly interpreted.

Uniform application of standards implies that if two or several licensers inspect a facility at the same time they would make the same decision as to whether to recommen issuance or denial of license and that there would be agreement as to which standards were complied with and which were violated.

"Tangible" standards relating to physical aspects of the child's growth and development (e.g., health and safety standards, or standards relating to space, etc.) are usually thought to be subject to a considerable degree of agreement. "Intangible" standards that have to do with a desirable psychosocial maturation are expected to present more difficulty in achieving uniformity.

One major day care licensing program evaluation found through use of a "paired-observers study" that intangible standards relating to personal characteristics of the day care operators and to the quality of care are subject to fairly high disagreement among licensers.

For reasons having largely to do with cost, there is also disagreement on tangible standards, such as the number of children and staff, space required, etc.

The need to administer standards uniformly if day care operators are to be treated fairly calls for experimentation with some new procedures and techniques. For example, development of formulas for the licensing decision as might be done by establishing a hierarchy of standards. Violation of any one standard in the highest group -- say, fire and safety hazard, corporal punishment, over-enrollment -- would be cause automatically to deny or revoke license; violation of two or three standards in the second group -- say those relating to outdoor play periods, specific kinds of play equipment or kitchen equipment -- would result in provisional licensing with a time limit within which the corrections would be made. A third group dealing mainly with such matters as record keeping would be given a longer time limit for correction. Obviously such formulas would have to be developed in consultation with the licensers themselves if they were to be accepted and used uniformly.

In the marginal situations that are so troubling to licensing personnel, a second licenser might be used to inspect and in consultation with the first a decision reached as to whether to recommend issuance or denial of license.

In all cases of decision to recommend denial, the family day care provider or center operator could be given the right to ask for a visit by a different licenser.

Development of better licensing appraisal forms -- ones that could be used more effectively for purposes of supervision and monitoring the degree of uniform application of standards would be desirable in many areas.

The maintenance of a consensus among licensing staff as to what each standard means and how compliance with it can be measured can only be achieved through a continuing planned dialogue among licensing staff as part of a program of in-service training and staff development.

Ineffective enforcement of licensing standards through excessive compromise on instances of noncompliance threatens the welfare of many children in day care and erodes the licensing process' potential for preventing hazards to children.

Factors that are primary in influencing licensing personnel to overlook noncompliance and fall into a pattern of over-benevolent licensing include:

1. The lack of a reliable frame of reference as to what particular standards mean (referred to earlier) leads to indecision and supportable judgments.
2. The lack of adequate training for their function leaves many licensing staff persons with an inaccurate understanding of the nature of their authority and the means to use that authority fairly and constructively (e.g., the nature of evidence, the procedures to be followed in denying

or revoking, and the constructive means of presenting one's authority in a way that can help the licensing applicant towards compliance).

3. The mixture of functions that still goes on in many states -- most detrimentally, responsibility for facility-finding, placement into day care, and then licensing that located day care -- forces licensing personnel into over-benevolent practices and over-response to the market factor in day care.
4. Not enough staff time allotted for interim supervisory visits, particularly where compliance is known to be marginal.

These factors in turn inhibit the readiness of licensing supervisors and administrators to provide support and backing to their personnel in the most difficult situations where denial or revocation of license should be carried out.

D. The Need to Assure Fairness in Rule Making

If standards are to be enforceable, it is essential that there be fairness in the making of rules. This can only be achieved if there is participation in the development of standards by representatives of those who will be required to comply.

And if standards, even when complied with are to help insure quality care for children, then the standards must be formulated as much as possible in relation to specific desired objectives and an identification of the means known to attain them.

Many of the mandatory standards are insufficiently related to factors that affect the child directly, e.g., day care practices that enhance or detract from children's relationships to their families.

VI. Federal Responsibility for Action

What, then, is the alternative? The nation cannot afford complacent acceptance of exposure of young children to injurious or inadequate day care services. The answer is to find the means to assure the kind of developmental care that should be the birthright of every American child.

(Such care is regarded as a program for the daytime care and development of children that includes: an understanding of an individual child's needs and stage of growth; consistent nurture; supportive emotional response; attention to the child's health and physical progress; and a variety of stimulating experiences which contribute to the child's cognitive and social development.)

To achieve out-of-home child care, which would meet these criteria, on an increased basis would necessitate the enactment of federal legislation to make available to the states and localities substantially increased federal grants to assist them in improving day care program quality and in making their enforcement of standards effective.

Because acceptable standard care will be beyond the means of a larger number of families, there is no alternative but to press also for considerably increased federal funding to make care of children in low income families available without cost, and for others, in families with incomes up to moderate levels, at fees scaled to income, or an interim basis. Ultimately, it is strongly likely that the United States (as many other democratic industrialized nations have long since done,[20]) will recognize that early childhood education is no less a public responsibility than elementary and secondary schooling and will make it available to all families which wish their children to benefit.

There will be those who argue that until there is a substantial increase in funds (for service subsidies, standard strengthening, and enforcement) the Federal Interagency Day Care Requirements should be weakened or discarded and that the states should not be encouraged to carry forward their efforts to upgrade service quality. This would be a seriously mistaken course of action.

The very existence of the federal requirements, even though not enforced to the degree that would have been desirable, has done much, by serving as a yardstick, to improve the quality not only of funded but also nonfunded care. They have also helped generate greater understanding of the fact that good care is not inexpensive and necessitates public support.

A retreat at this time would set back more than twenty years of effort to build recognition that outlays for developmental care are an investment that is repaid many times over. The child neglected during preschool years -- the most critical period of human development -- is a child far more likely than others to suffer learning, health, social and psychological disabilities, and to be an early dropout.

The federal government has continuing and essential responsibilities in the standard setting area. It must assure itself that its grants to the states and localities are spent effectively, fulfill the purposes intended by the authorizing legislation, and achieve the public welfare goal of assuring developmental day care for children. The realization of these objectives necessitates the continued application of federal standards.

This is not to say that the Federal Interagency Requirements should not be amended in any way. But we are challenged at this juncture to reexamine them both substantively and also with respect to the feasibility of their implementation.

The Department of HEW, in developing its report to Congress, due before April 1, 1978, with respect to any suggested revisions in the Interagency Requirements, should not only involve the members of an outside Review Committee which has been appointed to review recommendations prepared within the Department; it should also convene a working conference to seek the widest possible consensus on the part of representatives of child advocacy, other public interest and professional organizations and state officials concerned. A majority of these groups will undoubtedly urge the federal government to recognize its ongoing responsibility to assure adherence by federally funded programs to federal standards consistent with the 1968 Federal Interagency Day Care Requirements.

It should be recognized, in this connection, that the promulgation and monitoring of Federal Interagency Day Care Requirements have led to some dissatisfactions, not because of licensing staff in the states or personal at the federal level of government lack genuine concern for the quality of children's experiences in day care, or are unwilling to regulate the care, but because of other factors and problems. It is not feasibile to expect that the federal government can maintain mechanisms which will effectively monitor the day-to-day care given to children in the many day care facilities in the fifty states and the District of Columbia without superimposing upon the states and day care providers not only an additional set of mandatory standards but also a second layer of inspectors. Not only would such a move be unjustifiably expensive and awkward, it would lead to contentious division between states and federal government and unfair burdens placed upon day providers, already faced with multiple expectations from the state licensing authority and municipal and state fire, sanitation, zoning, and building code commissions.

Further, carrying out the licensing function is properly a responsibility for each of the states. The provision of federal funds for day care should be for the purpose of making quality care available where the states cannot, and providing leadership to the states in the enforcement of an effective day care licensing administration. The problem of concern is how the federal government can provide this leadership and at the same time insure fiscal responsibility for the allocation of its tax funds.

The compelling reason for some of the dissatisfaction which has been expressed with the outcome of the promulgation and monitoring of FIDCR is that licensing administration among the states is characterized by some basic and serious problems that have not been systematically addressed with firm intent and support to resolve them. Until this is done, no set of standards will be fully effective: the states will not be able to do much better than they are doing now in the regulation of day care. These basic problems in state licensing administration were discussed at some length in the previous section (Section V). They include (1) problems in interrelationships of agencies involved in day care regulation at state and local levels; (2) the need for more and better trained licensing staff; (3) the need for uniform application of standards, i.e., agreement within a state on a reliable and uniform frame of reference for the application of mandatory standards to assure equal treatment of applicants for licenses; and (4) the need to assure fairness and interest representation in the formulation of mandatory standards. In every state -- in those with a professional history of child-care regulation and relative sophistication in their approach to licensing -- these basic day care licensing administrative problems exist in varying degree.

Federal participation in day care regulation can be effective only to the extent that federal requirements are administered in relation to these identified problems of licensing practice among the individual states, and with a view to ameliorating the basic problems in licensing administration common to all the states.

Any set of standards developed by the federal government will be largely nonproductive unless it is applied within a framework of an individual state plan that can be expected to affect the major problems in licensing administration within that state -- problems which tend to overwhelm the effective application of any set of standards -- state or federal. Until these problems are acknowledged and attacked systematically, the effect of federal standards will be diluted and out-of-home child care norms in many communities will remain too low to assure needed protection to the nation's children.

To become eligible for federal day care program funds, and funds for the improvement of day care regulation -- which the Congress should be pressed to authorize -- each state should be expected to adhere to the Interagency Day Care requirements with respect to all federally provided programs. Each state should also be required to develop a day care licensing plan through a process of consultation and collaboration with HEW personnel, and groups directly affected by the state's licensing statute -- providers, parents, and other concerned and informed citizens. The plan should give a clear and factual account of the present status of licensing administration within that state. Accurate data should be given on such matters as (1) amount of funds allotted to the regulatory function and a breakdown of categories of expenditures; (2) numbers and qualifications of regulatory staff; (3) number of licensed facilities of each type and estimates of the number and location of unlicensed facilities; (4) distribution of the licensing staff in relation to location of licensed and unlicensed facilities; (5)the size of the existing average "caseload" for licensing representatives and a rationale for whatever size caseload has potential for optimal effectiveness; the kind of in-service training staff development programs that have been carried out in the past three years; (7) an outline of a staff development plan for the next year that includes learning objectives, curriculum content to meet those objectives, evidence of continuity in training, and methods of evaluating outcomes of training; (8) a comparative analysis of the state's mandatory standards in relation to FIDCR; (9) an evaluation of the state's licensing statute as compared to the Coalition for Children and Youth's Day Care Alliance model licensing statute with an indication of desirable revisions.

Each of these areas covered in the state plan should contain specific objectives that will lead to improved day care licensing. For example, a state's plan should show extent of progress aimed for within a specific time period in relation to individual problems, e.g., implementing a well-designed staff development plan; distributing licensing personnel more effectively in trouble areas of the state; reducing caseloads so that effective follow-up supervision is given to licensed facilities with marginal compliance; progress in drafting statute revisions and revising mandatory standards and in generating support for those changes.

In other words, within each individual state plan, for each identified basic problem in day care licensing administration there should be a stated objective, a set of tasks that will be carried out to affect that problem, a stated time period for the performance of those tasks, and a method of evaluating the outcome in relation to each basic problem.

The acceptance of such a state plan by the federal government would permit allocation of federal funds to that state, at agreed upon times. Further evidence of the implementation of the plan and of effective progress towards agreed upon goals would determine continuation of federal funds to that state.

To assist in the development of individual state plans it is suggested that the federal government develop guidelines setting minimal and mandatory standards for licensing in matters such as adult-child ratios, group size, staff qualifications, in service training, and physical facilities.

An advantage of such a program would be to allow for differences in problems faced by different states in accordance with population, geography and other factors. It should also assure that the establishment of national standards would not have the effect of lowering standards already in effect in some jurisdictions. Instead of imposing a single, national standard, this approach would permit the federal administrative agency to work with individual states to assure that efforts to upgrade existing standards and this enforcement are continuing.

Each State Day Care Licensing Plan would be individual in the sense that it would spell out the status of day care regulation in a given state at a particular time, its strengths and weaknesses, and show an agreed upon time line for achievement of a series of measurable objectives that would modify some of the basic problems of licensing administration. Day care standards in a vacuum achieve little; mandatory standards, whether federal or state, can only be as good as regulatory administration and practice.

Authority to promulgate such federal standards in its guidelines should be spelled out in an enabling federal statute. The responsible agency could then monitor the enforcement action in the various states under their plans, with incentives for good enforcement action in the various states under their plans with incentives for good enforcement programs coming through federal assistance in their development (both monetary and consultative) and sanctions in the form of withholding of funds for failure to maintain an adequate enforcement program.

Continuing eligibility for federal funds should depend upon progress towards the objectives agreed upon. Encouragement should be given for progress toward objectives that reflected innovative approaches in relation to day care providers and consumers.

Such an approach would go far toward helping to eliminate substandard care throughout the nation. It would help protect the basic rights of children by helping to narrow the major differences which now exist in the various state licensing codes and so assure minimal degree of protection to all children.

It is recognized that there are some difficulties in the suggested promulgation of two sets of standards, one -- the Interagency requirements for funded programs, and two -- less vigorous ones for others. But this would be only a temporary discrepancy. For the objective would be to provide assistance to those states with existing standards lower than those set forth in FIDCR, as revised, to upgrade them and improve their enforcement with a view to closing the gap as soon as feasible.

To facilitate federal-state collaboration in raising the national level of day care, on an ongoing basis, it is suggested that the HEW establish a day care advisory body composed of representatives of professional standard-setting organizations, federal, state and local officials concerned, organizations of child advocacy, public interest, other technical experts in the field, parents and providers. Such a group could assist in finding a base of mutual respect for the responsibilities and problems in relation to day care at each level of government, and would help to reach agreement on principles and actions to be taken in federal-state cooperation.

Questions will undboubtedly be raised as to the legality of federal intervention along the lines suggested. Supporting arguments are developed in Appendix A.

Alternatives to present-day state licensing approaches are discussed in Appendix B.

FOOTNOTES

1 Source: U.S. Department of Labor, Bureau of Labor Statistics, Release No. 77-191, March 6, 1977, "Married Persons' Share of the Labor Force Declining, BLS Study Shows."

2 These percentages related only to ever-married mothers. The 1976 numerical total above includes, for the first year in this series, never-married mothers.

3 U.S. Department of Labor, Bureau of Labor Statistics, Release No. 77-165, February 25, 1977, "Annual Study Shows Increase in the Number of Children Whose Mothers Work."

4 U.S. Department of Labor, Release No. 77-165, February 25, 1977, "Annual Study Shows Increase in the Number of Children Whose Mothers Work."

5 U.S. Department of Health, Education and Welfare, Children's Bureau, and U.S. Department of Labor, Women's Bureau, "Child Care Arrangements of Working Mothers in the United States," by Seth Low and Pearl G. Spindler, 1968. (Children's Bureau Publication 461.).

6 Group care was defined to include day care centers, nursery schools and like facilities.

7 "National Child Care Consumer Study: 1975," Volumes I, II and III, prepared by Unco, Inc. under contract with the Office of Child Development, HEW, 1976.

8 Based on Table X-1, Vol. II of Unco, Inc. Report.

9 Cared for in own home by parent or sibling.

10 Source: Unco Report, Vol. II, Table IV-9, Chapter 4, page 20.

11 Derived from Unco Report, Vol. II, Table IV-8, Chapter 4, page 17.

12 "Daytime Care of Children: October 1974 and February 1975," Current Population Reports -- Population Characteristics, Series P-20 No. 298, issued October 1976, Bureau of the Census, U.S. Department of Commerce.

13 Source: 1975 data: "School Enrollment, October 1975"; Current Population Report. Population Characteristics, Series P-20 No. 303, Bureau of the Census, U.S. Department of Commerce, issued December 1976. 1965 data: "Nursery School and Kindergarten Enrollment," Series P-20 No. 268, Bureau of the Census.

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14 See Unco, Inc. Report, Volume 2, chapter 5, page 15.

15 Total includes, in addition to proprietary, public and voluntary centers, those under unreported auspices. Data for years subsequent to 1972 are incomplete and hence are not shown.

16 P.L. 95-60, signed on June 30, 1977, postponed the completion of the FIDCR Appropriateness Study until April 1, 1978. On November 12, 1977, P.L. 95-171 was signed, extending the $200 million for day care at 100% Federal funding for FY 1978 and extending the day care staffing standards waivers contained in P.L. 94-401 for another year, through September 30, 1978. The Senate is expected to take action on H.R. 7200 early in 1978, and will then consider amending the day care provisions to reflect the enactment of P.L. 95-171.

17 Source: Department of HEW (Current as of October 21, 1975) as cited in "Data and Materials on Proposals Relating to Federal Child Care Standards," prepared by the staff for the use of the Senate Committee on Finance, January 1976.

18 The percentage failing to comply with the Federal Requirements would have been higher if the auditors had used the FIDCR ratio of 5:1 for 3 to 4 year olds and 7:1 for 4 to 5 year olds separately. Centers serving 3 to 5 year olds were regarded by the auditors as in compliance if the 7:1 ratio was met.

19 For example, see "How to Get the Best Day Care for Your Child: A Checklist," Paula O'Conner, ed. Child Herald, 1973.

20 See "Child Care Programs in Nine Countries," by Alfred J. Kahn and Sheila B. Kammerman: Cross National Studies of Social Service Systems, Columbia University School of Social Work, N.Y., under contract with Office of Child Development, HEW (HEW Publication No. (OHD) 76-30080), 1976. In France, for example, the study reported that "100 percent of all 5 year olds, 93 percent of the 4 year olds, 72 percent of the 3 year olds, and 22 percent of the 2 year olds were in public education programs in 1972-73....Kindergartens are projected to expand further to achieve 97 percent coverage for 4 year olds, 80 percent coverage for 3 year olds, and 30 percent coverage for 2 year olds by 1977-78."

APPENDIX A

The Legality of Federal Participation in the Day Care Regulatory Process

The federal government obviously has an interest in determining whether its money is being spent effectively, for the purposes it was designated, and with due regard for the constitutional rights of those involved. What might be termed the "purse strings" attachment has been the basis of considerable control over the content and scope of regulation in many areas of private activity in the past. In some instances, promulgation of a regulation which must be followed when federal funds are utilized has resulted in the creation of a standard for all such activities whether or not federal funds are being used. (The adoption of a single protocol for use in regulating human experimentation in some medical centers is an illustration of this result.) However, the "purse strings" attachment alone would not now be a basis for federal regulation covering all child care facilities because some operate without federal assistance. Thus the federal standard is not so likely to become applicable to all such facilities unless it is formally adopted by the individual states.

Today in some states we have the practical problem of two sets of day care regulations: FIDCR, applying only to services involving federal support, and state regulations applying in other instances. In some instances the regulations may be similar or virtually identical;

in others there are substantial differences, raising the question of just what minimum standards should be applied generally, along with possible criticism that one standard is overly strict or limiting. A further problem is whether it is fair to children in day care to have such differing provisions applicable solely on the basis of who is furnishing the money.

Because the federal government is concerned with protecting the basic rights of its citizens regardless of whether they are engaged in federally financed or sponsored activities, some would assert that federal regulation could be extended broadly in the area of child facilities regulation without a showing of federal financial involvement. Others might hang such regulation on a different constitutional peg, such as regulating interstate commerce or public health. Whatever the basis for justification of federal expansion of activities in the day care regulation area, either alone or in cooperation with the states, some have raised the question whether it is an area in which federal intervention is legally permissible in any but the narrowest sense, if then. The key objections seem to center on questions of invasion of both state's and parents' rights. While the licensing and regulation of child care facilities can be considered closely analogous to public health regulation,as noted by an observer of day care licensure some years ago[1], the objections mentioned above center on a recognition that day care regulation also can be regarded as an integral part of the family law area. It is to the legal problem of viewing child care regulations in this latter context that this section is largely directed. Following an explanation of some of the recent, key constitutional decisions which seem relevant, certain significant legislative programs which seem analogous will be examined as possible models for federal action.

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[1] Class, Child Care Licensing as a Preventive Welfare Service (1967) (mimeograph). See, also, Paulsen, The Licensing of Child Care Facilities -- A Look at the Law, 21 Ala. L. Rev. 1 (1968).

It must be recognized that even if there is no basic constitutional objection to certain federal participation in day care regulation, there still may be constitutional problems regarding the delegation of authority to the appropriate rule making authority, as well as the reasonableness of the rules and regulations which ultimately may be promulgated.

A. The State's Rights Issue: An Historical Background

Legal rules on divorce and family law in general long have been left for the most part within the province of our individual states. This reflects the fact that under our federal constistitution marriage regulation is considered a matter reserved to the states in accordance with the tenth amendment.[2] At an early date our federal courts also developed a largely unexplained policy of abstaining from judicial consideration of most matters involving family law problems, even in cases where it would seem that federal court jurisdiction could be based not on constitutional concerns but on diversity of citizenship of the parties and the requisite amount of money in dispute regardless of the subject matter at issue.[3]

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[2] For further discussion of this in the context of divorce, see Wadlington, Divorce Without Fault Without Perjury, 52 Va. L. Rev. 32, 35 et seq. (1966).

Although it seemed obvious that at some point basic federal constitutional guarantees of due process and equal protection of the laws should be applicable to protect citizens from arbitrary state legislative provisions enacted ostensibly for regulation of the family, it has been only within the past decade that the United States Supreme Court has made it clear that judicial remedies will in fact be broadly available to define the outer boundaries of constitutionally permissible state regulation and to invalidate those provisions which extend beyond them. Since 1967, however, the Supreme Court has made it clear in a series of opinions that arbitrary state statutes can and will be set aside for denial of equal protection or due process of law, or for infringement of what has become an expanding right of individual privacy. These decisions have come in cases involving such varying concerns as miscegenous marriage,[4] illegitimacy,[5] abortion,[6] contraception,[7] and access to divorce for indigents.[8] During the same period, the Supreme Court also has established that the Constitution requires that state juvenile courts must accord young persons appearing before them certain basic procedural rights which often formerly had been ignored on the theory that the involved minors were being dealt with benevolently by the state as "parent" rather than as a criminal prosecutor.[9]

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[3] Barber v. Barber, 62 U.S. (21 How.) 582 (1959). See, also, Williamson v. Williamson, 306 F. Supp. 516 (W.D. Okla. 1969), and Spindel v. Spindel, 283 F. Supp. 797 (E.D.N.Y. 1968). In Spindel the court did decide that it had jurisdiction to determine the validity of a divorce decree in an attack by a New Mexico wife against a Mexican divorce decree which she alleged that her New York husband had obtained through fraud. The copiously annotated opinion traces the history of the doctrine in family law cases.

Although there had been earlier U.S. Supreme Court decisions dealing with state laws affecting procreation,[10] the bulk of the case law concerning applicability of the fourteenth amendment to state family laws dates from the year 1967 with the Court's decision in *Loving v. Virginia*.[11]

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[4] Loving v. Virginia, 388 U.S. 1 (1967).

[5] See, e.g., Levy v. Louisiana, 391 U.S. 68 (1968); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Gomez v. Perez, 409 U.S. 535 (1973).

[6] Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

[7] Griswold v. State, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972).

[8] Boddie v. Connecticut, 401 U.S. 392 (1971).

[9] In Re Gault, 387 U.S. 1 (1967).

[10] The classic cases involved interpretation of compulsory sterilization laws. In Buck v. Bell, 274 U.S. 200 (1926) a Virginia statute

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10 (continued) authorizing involuntary sterilization of mental defectives was upheld. In Skinner v. Oklahoma, 316 U.S. 535 (1942), the U.S. Supreme Court struck down an Oklahoma statute providing for compulsory sterilization of habitual criminals. The Oklahoma scheme, which applied to three time larcenists but not three time embezzlers, was considered to violate the equal protection guarantees of the fourteenth amendment.

11 388 U.S. 1 (1967).

In the Loving case, the Supreme Court held that Virginia's statutory scheme for prohibiting miscegenous marriages was based on a classification which violated equal protection guarantees, and also that the law deprived the parties of liberty without due process of law. It seems significant to note that the Virginia statute was sufficiently distinct in format that the Court might simply have struck this state's law alone.[12] Instead, however, it chose more sweeping language which effectively ended similar restrictions on marriage then extant in fifteen other states.

The Supreme Court had seemingly ignored several earlier challenges to the anti-miscegenation statutes, including one from Virginia.[13] And many lawyers and scholars had felt that until the Supreme Court struck down the provisions dealing with racial discrimination in marriage, there was relatively little hope for successfully challenging other state regulations in the family law area which might be deemed arbitrary infringements upon rights assured to individuals under the federal constitution. Thus the Loving decision gave impetus to legislative reform which already was long overdue in the family law area.[14] The movement toward change was accelerated by the fact that the family law on the statute books often reflected the mores of two or three (and sometimes four) generations past, and pressures for reform in areas such as divorce were very strong.[15]

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[12] For discussion of certain of the unusual features of the Virginia law, including its exception for the heirs of Pocahontas, see Wadlington, The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective, 52 Va. L. Rev. 1189 (1966).

[13] See e.g., Naim v. Naim, 197 Va. 80, 87 S.E. 2d 749, vacated and remanded, 350 U.S. 891 (1955), aff'd, 197 Va. 734, 90 S.E. 2d 849, appeal dismissed, 350 U.S. 985 (1956).

In 1968 the U.S. Supreme Court rendered a decision which some have to regard as the first major judicial victory in the then recent "children's rights" movement. In Levy v. Louisiana,[16] the Court held invalid, as a denial of equal protection of law, a Louisiana statute barring recovery by an illegitimate child for the wrongful death of its mother when a legitimate child would have been afforded such an action. Some doubt was cast about the vitality of this holding by another decision of the Court three years later which permitted a certain amount of discrimination based on illegitimate status in intestacy laws dealing with inheritance.[17] The following year (1972), however, saw the Court make it clear, in Weber v. Aetna Casualty and Surety Co.,[18] that the Levy rationale remained intact. In Weber, a case involving an illegitimate child's entitlement to workmen's compensation benefits for the death of a natural father, on equal footing with the father's legitimate children, the opinion of the Court written by Justice Powell stated:

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[14] Predictions by scholarly authors of the potential impact of the Loving decision no doubt were influential in this movement. See, e.g., Drinan, The Loving Decision and the Freedom to Marry, 29 Ohio St. L.J. 358 (1968); Foster, Marriage: A "Basic Civil Right of Man" 37 Fordham L. Rev 51 (1968).

[15] The widespread adoption of "no fault" divorce grounds by State legislatures since 1970 affords an excellent illustration of how the reform movement burst onto the legislative scene.

[16] 391 U.S. 68 (1968).

> "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust.*** Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where -- as in this case -- the classification is justified by no legitimate state interest, compelling or otherwise."[19]

In 1973, the Supreme Court in Gomez v. Perez,[20] further held that the State of Texas could not constitutionally grant legitimate children a judicially enforceable right to support from their natural fathers and at the same time deny such a right to illegitimates.

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[17] Labine v. Vincent, 401 U.S. 532 (1971).
[18] 406 U.S. 164 (1972).
[19] Id. at 175-176.
[20] 409 U.S. 535 (1973).

During this same time frame two other cases loomed large in the area of federal review of state family law regulation. Stanley v. Illinois,[21] decided in 1972, held that an unwed father must be afforded the opportunity of a hearing on parental fitness for custody of his illegitimate children on the death of their mother. It is hard to characterize Stanley as a case involving children's rights. It is instead a case in which the Court seems most concerned with discrimination based on sex: If unwed mothers had certain rights, then why should unwed fathers not have them? However it also is clearly a case in which the Supreme Court held that due process and equal protection guarantees of the Fourteenth Amendment to the United States Constitution served to define the permissible degree of state limitation of parental rights. As those who have been associated with the adoption field are well aware, it also is a case which unfortunately had sweeping impact on children and the adoption process, even though their interests were not broadly presented at the time to a court which, by way of dictum in a footnote, made some rather naive remarks about the inconsequentiality of "the incremental cost of offering unwed fathers an opportunity for individual hearings on fitness...."[22]

In Roe v. Wade[23] the Supreme Court recognized that a woman has a qualified right to an abortion and invalidated a Texas law which imposed criminal sanctions against all abortions except those imposed to save a mother's life. In a companion case, *Doe* v. *Bolton*,[24] the Court also set aside a number of special requirements in Georgia's abortion statute which were deemed unreasonable because they obstructed access to abortion.

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[21] 405 U.S. 645 (1972).
[22] Id. at fn. 9, pp. 667-668.
[23] 410 U.S. 113 (1973).

The *Roe* decision has been criticized in some legal circles for the lack of conceptualization in explaining how the court reached its decision.[25] Also, the somewhat unusual opinion in *Roe* is characterized by a rather detailed statement of how the pregnant woman's qualified right can and cannot be limited. (Although narrowly detailed in some respects, it nevertheless was sufficiently unclear that revised abortion laws from several states have since been considered by the Supreme Court and further problems still remain unresolved.)[26] The case has been labeled by some as a revival of the judicial doctrine of substantive due process. Under this doctrine, which has been used far less by the Supreme Court recently than it was until several decades ago, courts can evaluate and impose restrictions on the substance of governmental regulation, independent of procedural limitations which might flow from the concept of due process. As one distinguished constitutional law scholar has put it:

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[24] 410 U.S. 179 (1973).

[25] For some of the law review commentary on *Roe* and *Doe*, see Tribe, the Supreme Court, 1972 Term, Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 Harv. L. Rev. 1 (1973); Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920 (1973)

[26] See, e.g., Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 428 U.S. 132 (1976).

"The question is whether due process authorizes the Court to resort to what some have called natural law or non-interpretive modes of constitutional interpretation: to pour into the due process clause fundamental values not readily traceable to constitutional test or history or structure."[27] From the standpoint of the present analysis, implications for new vitality for the substantive due process doctrine in the family law area are most important, along with the fact that the case also can be considered as representing a further expansion of the concept of privacy. The latter earlier had been used by the Court as part of the justification for setting aside state legislative restrictions prohibiting counseling on birth control to married couples (Griswold v. State)[28] and providing dissimilar treatment between married and unmarried persons in banning contraceptives (Eisenstadt v. Baird)[29] In Carey v. Population Services International, the Court further expanded the privacy concept in a case dealing with the constitutional rights of minors, striking down a New York law which made it a crime to sell or distribute contraceptives of any kind to persons under sixteen.[30] Further development of the right of individual as well as marital privacy, in the context of constitutional guarantees of free speech, association and religion, is likely to continue within the judicial process over the near term. It is still an emerging doctrine, not yet fully defined by any means.

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[27] Gunther, Cases and Materials on Constitutional Law (9th ed. 1975), at 616.

[28] 381 U.S. 479 (1965).

[29] 405 U.S. 438 (1972).

[30] 45 U.S. Law Week 4601 (June 7, 1977).

B. Possible Meanings of the Recent Federal Judicial Developments

The preceding jurisprudence, largely based on equal protection and due process guarantees or on the emerging rights of privacy both in and outside of marriage, has clearly established that constitutional guarantees will be applied to the courts to limit state legislative action in the family law field. Though this is a proposition which many have assumed for a long time, not until the judicial action of the past decade was such a result assured except in the most egregious of violations, if then.

In short, while family law remains an area still regarded as basically within the perimeters of state regulation in accordance with the Tenth Amendment, such state laws will be subject to review and annulment to the extent they encroach upon individual guarantees otherwise contained in the federal constitution. Typically these rights are secured through the First and Fourteenth Amendments.

If state legislation can be invalidated, can the federal government actively legislate in areas concerning matters such as regulation of the family which, as stated earlier, traditionally had been deemed to be reserved to the states control under the Tenth Amendment?

The Fourteenth Amendment is best known for the part of Section one which states:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5 of the amendment, not so well known, provides:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The exact scope of this power to legislate to enforce Fourteenth Amendment rights is not clear in the family law field. Barring restrictive judicial interpretation, however, it would seem to have increasing potential today in view of some of the cases discussed previously. It is arguable, for example, that a federal abortion statute might be passed to implement Roe v. Wade, the abortion decision. (This would be somewhat ironic in view of the previously mentioned criticism that the Roe opinion is itself being attacked because of the statute-like provisions which are set forth within it.) Or if some case were to hold that there is a right to divorce with only a minimum of state procedural limitation,[31] the case for a federal divorce statute would be greatly enhanced. Thus far, however, there has been little movement toward federal legislation in the family law field under the implementation clause of the fourteenth amendment, and if this were the only possible constitutional argument in favor of such legislation, it appears that day care regulation would not be the place to try for a start. One reason for this conclusion is the belief that use of the implementation clause for such federal legislation will most likely follow only after there has been a fairly clear articulation of the scope of the constitutional rights to be protected, along with some showing that federal legislation clearly is needed to accomplish such protection.[32] The doubtfulness of proceeding under this approach at the moment, because of the lack of clear development of the scope of children's rights, does not preclude certain limited federal regulations on other bases, however, or broader, joint federal/state cooperative ventures, as will be discussed subsequently.

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[31] The Supreme Court may have started toward this direction in its holding that if a state provides for divorce it must afford all its citizens access to the courts, regardless of their financial condition. See Boddie v. Connecticut, 401 U.S. 392 (1971). Subsequently, however, the Court upheld an Iowa law requiring the Petitioner in a divorce act to be a resident of Iowa for one year before bringing suit. Sosna v. Iowa, 419 U.S. 393 (1975).

[32] Instances in which actions of the U.S. Congress have been set aside as infringing on basic states' rights have been extremely rare for many years. Perhaps the leading illustration of such a case in modern times is seen in United States v. Arizona, 400 U.S. 112 (1970). The United States Supreme Court held that Congress could set the voting age with regard to federal elections but not pertaining to state and local elections. In the same decision, however, the Court held that Congress under the Fourteenth and Fifteenth Amendments (the latter dealing specifically with voting rights), could prohibit literacy tests or other devices used to discriminate on the basis of race, in both state and federal elections. This illustrates the point noted earlier as to federal power to intervene even through specific legislation if the purpose is to protect constitutional rights guaranteed to the individual.

C. The Concern for Intervention in the Family Decisionmaking Process

Until recently there was what might be described as a "hands off" attitude by most state courts in matters involving decisionmaking within the going family regarding such matters as education, religious upbringing, discipline and the like. In the broken family, of course, the decision to place a child in the custody of one of the parents usually will result in a choice, conscious or unconscious, concerning such matters. And after divorce, courts frequently are asked to listen to complaints about the custodial parent's decisions and conduct in various ancillary proceedings dealing with issues such as visitation rights, changes of custody, and support. The difference has been explained in the past as centering chiefly on the desire to avoid intrusion into family decisionmaking which might ultimately be disruptive of existing marital relations.

This is not to say that courts are without power to intervene in the family decisionmaking process. Either through broad statutory authorization or under the doctrine of parens patriae courts are generally vested with considerable authority to control or overrule parental decisionmaking, to remove children from their parents, and even to terminate parental rights.[33] Ordinarily such actions can be taken only after a showing of some severe danger or harm to a child or of parental incapacity functionally to continue carrying out the duties of the relationship effectively. And courts have in the past often been reluctant to utilize fully the powers bestowed upon them in this area. For example, it was through a self-imposed policy of discretion or abstention that courts in the past typically would involve themselves in medical decisionmaking only in the most serious situations -- generally those which threatened the life of a child.[34] However, necessary blood transfusions might be permitted by a court over a parent's objection even if based on religious beliefs and thus presenting potential first amendment problems of religious freedom.[35]

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[33] See Mnookin, Child Custody Adjudication: Judicial Functions in the face of Indeterminancy, 39 Law and Contemporary Problems 226, 240 et seq. (1975); Wald, State Intervention on Behalf of Neglected Children: A Search for Realistic Standards, 27 Stan. L. Rev. 985 (1975); Wald, State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 625 (1976).

[34] See, e.g., Matter of Seiferth, 309 N.Y. 2d 80, 127 N.E. 2d 820 (1955); In re. Hudson, 13 Wash. 2d 673, 126 P. 2d 765 (1942); Wadlington, Minors and Health Care: The Age of Consent, 11 Osgoode Hall L.J. 115 et seq. (1973).

[35] See, e.g. State v. Perricone, 37 N.J. 463, 181 A.2d 751, cert. denied, 317 U.S. 890 (1962).

The life threatening test for intervention has given way to a more flexible approach in a number of jurisdictions today.[36] This seems to be part of a broader trend toward recognizing that the power of a parent can indeed be despotic, and that too often it may be exercised with neither benevolence nor rationality. The change also seems to reflect general recognition that children's rights must be protected even at the risk of jeopardizing existing family harmony or continuing personal relationships.

Perhaps more dramatic an indicator of the policy concern toward protection of children from parental action and inaction are the child abuse reporting statutes, some form of which is now found in every state.[37] Informer type statutes have never been popular in this country, yet that is basically what child abuse statutes are. The laws require certain categories of persons, typically those within the medical and education establishments, to report to some state agency any suspected case of child abuse. The term "child abuse" has been broadly defined in a number of statutes to range from cases of overt physical mistreatment to sexual molestation, medical neglect, and in some jurisdictions possibly emotional neglect or mistreatment.

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[36] See, e.g., In re. Sampson, 65 Misc. 2d 658, 317 N.Y.S. 2d 641 (Fam. Ct. 1970), aff'd 29 N.Y. 2d 900, 278 N.E. 2d 918, 328 N.Y.S. 2d 686 (1972); In re. Karwath, 199 N.W. 2d 147 (Iowa 1972). For further discussion of this general area, see Bennett, Allocation of Child Medical Care Decisionmaking Authority; A Suggested Interest Analysis, 62 Va. L. Rev. 285 (1976).

[37] For a general discussion of the various types of reporting statutes, See Paulson, Child Abuse Reporting Laws: The Shape of the Legislation, 67 Columbia L. Rev. 1 (1967).

The statutes are State enactments, but they are mentioned to illustrate the degree to which our laws today justify and even encourage intervention into family activities in order to protect the welfare of minor children. It is also worthy of note that the federal government has become involved in this area through the Child Abuse Prevention and Treatment Act of 1974,[38] which established the National Center on Child Abuse and Neglect. Aside from serving as an information clearinghouse, publishing an annual research summary, and publishing training materials for personnel in the field of child abuse prevention and treatment, the Center is charged with providing technical assistance to public and nonprofit agencies in carrying out such programs and with conducting research into the etiology of child abuse and studying changes in its incidence nationally.

The federal act provides for grants to the states for the purpose of assisting them "in developing, strengtening, and carrying out child abuse and neglect prevention and treatment programs."[39] To qualify for assistance under the program, a state must have in effect a child abuse and neglect law conforming to certain minimum provisions set forth in the federal statute itself, and also must demonstrate that there are sufficient administrative procedures, training personnel and related multi-disciplinary programs and services as may be necessary to deal effectively with abuse and neglect cases within the state.[40]

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[38] 42 U.S.C.A.§ 5101 et seq.
[39] 42 U.S.C.A.§ 5103(b).

Two of the recent series of constitutional law cases, Stanley v. Illinois[41] and Wisconsin v. Yoder,[42] may need some explanation as to their potential implications with regard to parental rights. As noted earlier, the Stanley decision held that Illinois could not discriminate against a father of illegitimate children by denying him a hearing on his parental qualifications following the death of the mother. In holding that procedural due process must be accorded the father, the Supreme Court did not set limits on the state's power to determine whether a parent was in fact qualified for custody or whether removal of the children would be justified under appropriate criteria established by the state for the protection of children.

In Yoder, the U.S. Supreme Court held that the State of Wisconsin could not compel public school attendance beyond the eighth grade against a claim by Amish parents that such attendance interfered with the practice of a legitimate religious belief. The case was pared

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[40] 42 U.S.C.A.§ 5103(B)(2)(B) and (D).

[41] 405 U.S. 645 (1972).

[42] 406 U.S. 205 (1972).

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extremely in its potential for other groups through the Court's indication that few sects could meet the burden of proof satisfied by the Amish parents.[43] And with regard to the point made by Justice Douglas in a separate dissent that the children themselves should be entitled to be heard on so vital an issue,[44] Chief Justice Burger writing for the Court's majority observed that the children were not parties to the litigation, that it was the parents who were sujbect to prosecution under the law involved, and that: "Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the state in an appropriate state court proceeding in which the power of the state is asserted on the theory that Amish parents are preventing their children from attending high school despite their expressed desires to the contrary."[45] In short, the Yoder case is extremely fact-limited, and larger questions as to the weight of parental control when conflicts with children's interests remain for further constitutional delineation in the future.

D. Some Recent, Relevant Judicial and Legislative Developments

Several relatively recent developments can be used as illustrations of how federal intervention has been deemed necessary in order to safeguard individual constitutional rights and to assure effective enforcement of state obligations.

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[43] Id. at 235-236.
[44] Id. at 241, 246.
[45] Id. at 231.

In *Wyatt* v. *Stickney*,[46] a U.S. District Court was confronted with the question of defining the constitutional rights of patients in Alabama's three state institutions for the mentally impaired. Though the class action was brought on behalf of the involuntary patients (who constituted the great majority of those confined), the remedy which was granted was also to have effect on voluntary patients in the institutions. One of the most interesting features of the court's decree was an elaborate set of standards which not only included matters such as guaranteeing patient privacy, but which also spelled out minimum educational and other requirements for various personnel, maximum size classes for teaching retarded patients, staffing ratios, personal housekeeping, nutritional, and physical facilities requirements.[47] The court also required progress reporting in the future to assure that compliance with the regulations outlined in the decree was being maintained.[48]

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[46] The *Wyatt* case has resulted in some five published opinions. For a background of this confusing history, see *Hoffman* and *Dunn*, *Beyond Rouse* and *Wyatt*: An Administrative-Law Model for Expanding and Implementing the Mental Patient's Right to Treatment, 61 Va. L. Rev. 297 (1975). See also, Case Comment, 86 Harv. L. Rev. 1282 (1973). The key decisions for the purpose of the present discussion are *Wyatt* v. *Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), which contained the detailed standards discussed in the text above, and *Wyatt* v. *Aderholt*, 503 F. 2d 1305 (5th Cir. 1974), in which an appeals court upheld the standards but did not find it necessary to determine whether they were constitutionally minimum requirements.

The basis for the court's decision in Wyatt was that a person who has been civilly committed has a constitutional right to treatment and that failure to provide treatment deprives one of due process guarantees. Obviously there is a significant difference between full time commitment in a mental institution and placement in day care. The case nevertheless seems significant in illustrating how a court, once finding the existence of some right which under the circumstances needed protection through judicial action, deemed it appropriate to deal widely with the regulation of the involved institutions to assure maintenance of individual rights, and not simply with the quality of medical treatment.

Another development which seems significant in its possibly analogous applications to the problems of federal day care regulation involves the Child Support Provisions of a recent federal enactment, the Social Services Amendments of 1974.[49]

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[47] For greater discussion of the regulations and their implications, see Hoffman and Dunn, supra note 56, at 304 et seq. See also, Murdock, Civil Rights of the Mentally Retarded: Some Critical Issues, 7 Family Law Quarterly 1 (1973).

[38] For another illustration of federal judicial intervention to safeguard the person rights of institutionalized, retarded children, see New York State Association for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (1973).

As noted earlier, there has been little success in achieving uniformity among the states in matters dealing with family law in general, even though a number of model and Uniform Acts have been produced in an attempt to further such a goal. The most notable (and one of the few) exceptions has been in the area of enforcing support obligations across state lines. A series of proposed Uniform Laws has been prepared for consideration by the states in helping to cooperate in enforcement of child and spousal support obligations when the parties are in different jurisdictions. The Uniform Acts themselves have gone through several versions of draftsmanship,[50] but all the states by this time have enacted some version of one of the proposals or some other law sufficiently similar to enable interstate enforcement of some such obligations. As might be suspected, there are numerous complications because of the differences in which "Uniform Law" a given state has adopted,[51] but the availability of such statutes has in the past at least exerted an *in terrorem* effect over runaway or otherwise absent parents and spouses.

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[49] 42 U.S.C.A. 651 et seq. For a general discussion of the new provisions, see Bernet, the Child Support Provisions: Comments on the New Federal Law, 9 Family Law Quarterly 491 (1975).

[50] The first Uniform Reciprocal Enforcement of Support Act was promulgated in 1950. This was revised in 1952 and again in 1958. The latest version of the model law, known as the Revised Uniform Reciprocal Enforcement of Support Act, was promulgated in 1968.

[51] In this regard, see Noted, The "Un-Uniform" Reciprocal Enforcement of Support Act, 9 J. Fam. Law 325 (1970).

Efforts at federal legislation to assist in the interstate enforcement of support obligations had been introduced in Congress on a number of occasions beginning as early as 1941, but the 1974 provisions were the first to make it through both houses of Congress and into law.

The new Child Support Provisions vest significant (some might even say sweeping) responsibility upon the federal government for the enforcement of support. While it must be recognized that the basic support obligation itself remains a creature of state law, the entrance into the enforcement field so broadly by the federal government, even in a pattern of state-federal cooperation, constitutes a significant expansion of federal legislative activity in the family law field.

The new Act provides for special state enforcement units and gives the Secretary of HEW control over them. A designee of the Secretary will head a new unit which is mandated with setting standards for the various state programs for locating absent parents, establishing paternity, and obtaining child support in order to assure that these programs will be effective.[52] The designee also will be charged with establishing minimum organizational and staffing requirements for the state units, with reviewing state plans for such programs, and with evaluating the implementation of the programs as well as technical assistance to them.[53] He will also operate a Parent Locator Service, as provided by the Act, which will utilize files and records of other departments and agencies of the federal government in order to help locate absent parents.[54]

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[52] 42 U.S.C.A. § 652 (a) (1).

Fairly detailed minimum requirements for any state plan for child support are set forth in the statute itself.[55] An unusual feature of the Act is its provision that the federal district courts shall have jurisdiction without regard to any amount in controversy, to hear and determine civil actions certified to them by the Secretary of HEW. Such certification is to be made to enforce court orders for support against absent parents:

> "upon a finding that (A) another State has not undertaken to enforce the court order of the originating state against the absent parent within a reasonable time, and (b) that utilization of the Federal courts is the only reasonable method of enforcing such order...."[56]

Other features of the new program provide for use of the Internal Revenue Service to collect certain support obligations when they have been assigned to a state, and for waiver of the sovereign immunity of the United States with regard to such support claims against its employees, thereby permitting garnishment of federal salaries.

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[53] 42 U.S.C.A.§ 652(a)(4).
[54] 42 U.S.C.A.§ 652(a)(9), 653.
[55] 42 U.S.C.A.§ 654.
[56] 42 U.S.C.A.§ 652(a)(8).

In summary, the new Child Support Provisions call for federal-state cooperation in enforcement of child support obligations -- traditionally an area under state control. The Act calls for creating a new federal organization which will set standards for various state enforcement provisions and will also perform a number of key functions on a national basis.

The practical reason for both the federal government's entry into the field and the high degree of state enactment of the Uniform Reciprocal Enforcement of Support laws is probably traceable to concern that state and federal welfare programs will necessarily have to take up the slack created by lack of enforcement of parental support obligations. But we must recognize that the basic concern is in fact assuring that children will be supported.[57] And parts of the new Child Support Provisions can be invoked by persons who are not receiving or eligible for any form of welfare assistance.

It is too early to attempt to evaluate the effectiveness of the program, even were this within the scope of this paper. However, the fact that such a program has come into existence and some of the mechanisms which have been established seem highly relevant to the potential problems of federal day care regulation.

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[57] 42 U.S.C.A.§ 651 states as the purpose of the act: "...enforcing the support obligations owed by absent parents to their children, locating absent parents, establishing paternity, and obtaining child support...."

First we must ask why it was felt that there was a need for federal involvement. As noted previously, the states had achieved a greater amount of cooperation and perhaps also uniformity in the area of child support than had been effected in other areas of family law. Unfortunately, however, the mere existence of Uniform Laws on the statute books did not accomplish the result of achieving enforcement. A key problem was lack of funds and personnel for operating such programs. Another problem was the lack of any incentives for governmental bodies to enforce obligations due in other states or any effective sanctions against the states for nonenforcement. By providing methods for reimbursement of one government for some of the costs of assisting in the enforcement of a support obligation created by another, and by tying the enforcement program into public assistance and instituting monetary sanctions for failure to maintain effective support programs, the new Child Support Provisions have sought to provide such incentives to action. In short, the federal approach is designed with the goal of providing a means for monitoring and for encouraging effective enforcement.

A number of additional examples of recent federal enactments designed to protect constitutional rights of children and their families can be pointed out to show the willingness of the Congress to legislate on a national basis in this general area. One such example is the Family Educational Rights and Privacy Act of 1974,[58] which was concerned with the gathering and use of information about children and their families within the nation's schools.[59]

Still further analogies can be found in other areas. Most typically there is some "purse string" attachment involved. In the case of nursing homes, for example, the availability of federal mortgage insurance is made to hinge upon there being in force "reasonable minimum standards of licensure and methods of operation governing it."[60] The Older Americans Act,[61] which establishes an Administration on Aging, makes it a duty and function of that entity to "provide technical assistance and consultation to states and political subdivisions thereof with respect to programs for the aged and aging...."[62] Another duty is to "carry on continuing evaluation of the programs and activities related to the purposes of this chapter (Programs for Older Americans), with particular attention to the impact of medicare and medicaid, the Age Discrimination Act of 1967, and the programs of the National Housing Act relating to housing for the elderly and the setting of standards for the licensing of nursing homes, intermediate care homes, and other facilities providing care for older people...."[63]

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[58] 20 U.S.C.A.§ 1232 et seq.

[59] For a more detailed discussion of the Act, see Comment, Protecting the Privacy of School Children and Their Families Through the Family Educational Rights and Privacy Act of 1974, 14 J. Fam Law 255 (1975).

[60] 12 U.S.C.A.§ 1715w (d) (4).

[61] 42 U.S.C.A.§ 3001 et seq.

[62] 42 U.S.C.A.§ 3012(a) (5).

E. Conclusions

What we see in the preceding cases and statutes is a recognition that the rights of children are to be protected by the Fourteenth Amendment and other provisions of the federal Constitution, an increased willingness of courts to intervene in decisionmaking which formerly had been left largely to parents, and a movement toward more state-federal cooperation in matters affecting children and families.

Statutes such as child abuse reporting laws also evidence a policy of recognition that the interests of children and their parents can be inimical and that the state has a role to play in protecting the child from unnecessary or excessive physical, sexual or emotional abuse, as well as medical neglect. In some jurisdictions there is an increasing trend toward appointment of independent counsel to represent children in divorce and other family proceedings,[64] in further reflection of the recognition that a child's interests may not be adequately asserted by his parents, or even may be compromised by their dealings involving their own financial or other interests.

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[63] 42 U.S.C.A.§ 3012(a)(14).

[64] § 310 of the Uniform Marriage and Divorce Act, for example, provides that: "The court may appoint an attorney to represent the interests of a minor or dependent child with respect to his support, custody and visitation."

All these factors add up to indicate why the present "Children's Rights" movement has gotten underway, amorphous though its scope may be.[65] The articulation of just what rights children are constitutionally guaranteed in regard to matters such as education, health, and minimum parental or substitute parental care remain to be articulated; until this is effected, the permissible scope of direct federal establishment of day care regulation, in instances where federal funding is not involved, also remains unclear. However, in developing any effective national day care policy and program it would seem most important to assure that the interests of all children are effectively considered and that effective means to protect them are undertaken. The safest path at the moment from a constitutional standpoint would seem to be increased state-federal cooperation.

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[65] The present confusion over trying to develop a constitutional framework for the protection of children's rights, while at the same time neither unduly encroaching on the rights of parents nor calling for overly vigorous state action, is exemplified in Organization of Foster Parents for Equality and Reform (OFFER) v. Dumpson, 411 F. Supp. 1144 (1976), now on appeal to the U.S. Supreme Court.

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APPENDIX B

Alternatives to Present-Day Licensing Approaches

1. Is there a case for deregulation or for the substitution of registration for licensing?

Because standard-setting and enforcement costs money and money is hard to come by, and because regulation is difficult to administer, it is occasionally suggested that the current state system of day care regulation should be abandoned or that registration of facilities be substituted for the licensing process. It is suggested that the monitoring of standards can be adequately carried out by parents themselves.

Parents are not so situated as to be able to carry this responsibility nor is there any reason to believe they will become able to do so in the future.

There is basic and growing awareness in every community that the weakening of standards and their enforcement would cost far more in human and economic terms, in consequence of child neglect, than what is needed to make them effective. The very suggestion that societal responsibility for child welfare be abrogated would rightly meet with strong national opposition from parents, and from many hundreds of child advocacy organizations and their scores of millions of members. They clearly recognize the progress that has been made in improving day care services through the licensing process and how much children and their families have benefitted. So, too, do many operators of day care centers, providing care of adequate quality, who increasingly have come to favor the establishment of standards and more stringent monitoring of the marginal or only minimally adequate centers.

The findings of the Illinois Economic and Fiscal Commission which made an intensive day care study in 1974 strongly support this conclusion. It reported: "In our surveys, overwhelming majorities of operators and parents indicated opposition to deregulation. Many in fact, expressed a desire for more intensive regulation. There is a strong belief among program participants that state regulation plays an important part in assuring quality care and protection for children. Moreover, the national trend is for most states to license both homes and centers."[1]

The suggestion that day care centers might be registered instead of licensed cannot be supported by any persuasive evidence. Similar self-monitoring has failed in other fields. Nevertheless, the registration of family day care homes is sometimes put forward as somewhat more defensible because only a very small percentage of such homes are presently licensed. Despite the fact that the laws of about three-quarters of the states call for universal regulation, a large

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1 Page 89, "Day Care Licensing and Regulation: A Program Evaluation," Illinois Economic and Fiscal Commission, October 1974.

majority of providers of home care are unknown to the licensing authorities. This is in sharp contrast to day care centers which are generally identified and brought under the supervision of the licensing authorities. It is assumed that if home operators were required to register with the designated states authority they would comply and thus become more visible. There is little if any evidence available, however, to indicate that they would do so inasmuch as they would have to certify that they had read the standards and would adhere to them, would have to be inspected at least once a year, and would be subject to fines if found in violation. It is argued, nonetheless, that if the authorities could identify many providers, not known to them under the licensing approach, the quality of their service could then be more adequately assessed and determination made of the desirability of retaining licensing or substituting registration.

Michigan is presently carrying out a demonstration project in six counties in which day care homes are being registered and a comparison of the results is being evaluated.[2] More such evaluation on a demonstration basis would be revealing. But until findings are available and carefully appraised and there is far greater understanding of the problems peculiar to the registration approach, it would be a serious error for the states to turn prematurely to registration of family day care homes, as they are being pressed to do so by a number of proponents of registration.

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[2] Michigan Department of Social Services, Publication No. 289, February 1976.

It should be noted also that registration to be effective would have to be coupled with a strong program of public education and that it would require substantial financial support to be properly carried out and might in fact be considerably more costly than a licensing system. Further, it should be pointed out that there is already very substantial evidence against the registration of homes as an alternative to licensing. The Illinois Economic and Fiscal Commission day care study previously referred to is illustrative and points to a number of serious disadvantages:

> "First, operators could misrepresent their compliance with standards at initial registration, so there would be no way to be sure children were adequately protected. The longer period before initial inspection could increase the probability of undetected substandard conditions. Also, the Department of Children and Family Services representative would have less information upon which to make decisions about standards compliance.

"In addition, according to our surveys, both operators and parents were opposed to this change by at least three-to-one ratios. Some operators told us they valued the State license for its prestige...

"Registration has not found support in other states. Our survey of other states indicates that most have either adopted or are moving toward full licensing for day care homes."

The responses of parents, queried in connection with the Commission survey, in opposition to the substitution of registration for licensing of family day care homes also revealed inherent dangers. A few of these responses follow:

"Some people should not have someone elses children under their care -- for reasons of health, temperament, home and family situations. Regular inspections help keep operators on her "Toes." Strangers to an area need a form of protection in selecting a "home or center" for their children."

"Because the inspection could conceivably not occur for up to 12 months, children could be endangered by an unsafe environment for that length of time."

"Abuse could occur between the inspections -- also, licensing carries more a threat or an incentive to quality homes."

"We can always hire someone who is not licensed, especially for a one-to-one basis with our child. However, if there are several children in the home, the woman is no longer a 'sitter.' she is running a profitable business, and is handling a precious commodity. She should have to maintain strict standards."

"I have faith in the state 'requirements' -- a working mother like me must be able to count on the best care possible."

2. Can family day care homes be effectively "satellited"?

While no defensible case has yet been made as to viable alternatives for the present licensing system with respect to day care homes, the fact that the large majority of homes remain outside the system is undeniable. However, the percentage of homes being licensed has been increasing at a fairly rapid rate in recent years. This process could be speeded and the quality of day care home service very considerably improved were the states and localities to encourage and assist in the satelliting of a network of family day care homes around central service centers. This has been done very effectively in New York City which has funded the establishment of such centers. Center staff members are responsible for working closely with large numbers of day care home providers in the neighborhood and for assisting them in meeting the city's high standards of care. They provide monitoring and training, arrange for the circulation on a loan basis of books, toys and other play

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equipment, and provide central purchasing services, among many others.

There is room for other avenues of experimentation, demonstration and evaluation tc improve the quality of day care.

NOTE TO THE READER:

The interpretations and conclusions expressed in this paper are the author's and are not intended to represent the position or policy of the Department of Health, Education and Welfare.

It is being distributed to solicit comments and criticisms to assure technical soundness, the adequacy of supporting materials, relevance, and general comprehensibility. It is hoped that this paper and its review will contribute to the improvement of the public debate on social policy and the proper Federal role in regulating child day care.

Comments may be addressed to:

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